84-598

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BURLINGTON NORTHERN RAILROAD COMPANY,
Successor in Interest by Merger to St. Louis-San Francisco Railway Company,
Petitioner,

vs.

RAY FRAVEL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

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QUESTIONS PRESENTED

Missouri State Courts have consistently refused to acknowledge the well settled doctrine that federal substantive law controls the measure of damages and permissible evidence in a Federal Employers' Liability Act (FELA) case tried in a State Court. This case presents several important questions with wide ranging effects resulting from that refusal:

1. Whether Missouri State courts may permit counsel for a Federal Employers' Liability Act plaintiff to inject the false issue of retaliatory discharge into a FELA case for personal injury, contrary to the decisions of this Court and other Federal Courts.

2. Whether the Missouri Courts improperly permitted Plaintiff-Respondent in this FELA case to inflame the jury by exhibiting and demonstrating his injuries and scars to the jury in a manner that Missouri Courts have prohibited in non-FELA cases.

3. Whether the Missouri Supreme Court may continue to order the use of a damage instruction in Federal Employers' Liability Act cases that unconstitutionally permits the jury to use an improper measure of damages.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

INTRODUCTORY STATEMENT

Burlington Northern Railroad Company, successor in interest by merger to St. Louis-San Francisco Railway Company, petitions this Court for a Writ of Certiorari to review the judgment and opinion of Division Two of the Missouri Court of Appeals, Eastern District.

OPINIONS BELOW

The opinion of Division Two of the Missouri Court of Appeals, Eastern District, dated April 24, 1984 has not yet been reported to the knowledge of Petitioner's Counsel, but that opinion is Numbered 47024 and is appended to this Petition for Certiorari as Appendix A. In addition, the order denying Peti-

tioner's Motion For Rehearing by the Missouri Court of Appeals is appended as Appendix B and the order of the Missouri Supreme Court denying Petitioner's Motion To Transfer the Case is appended hereto as Appendix C.

JURISDICTION

The judgment and opinion of the Missouri Court of Appeals, Eastern District, Division Two, was entered on April 24, 1984. Petitioner's timely Motion for Rehearing was denied on June 1, 1984. Petitioner's Motion For Transfer to the Missouri Supreme Court was denied on July 17, 1984. Petitioner's Motion for a Stay of Further Proceedings pending final action by this Court was inexplicably and summarily denied by the Missouri Court of Appeals, Eastern District, on July 31, 1984 but in spite of that attempt by Missouri Courts to thwart, deny or hamper Petitioner's right to Petition this Court for a Writ of Certiorari, this Petition has been filed within 90 days of the denial of Petitioner's Motion to Transfer.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

STATUTES INVOLVED

35 Stat. 65, as amended, 45 U.S.C. §51

Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving

widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

STATEMENT OF THE CASE

Respondent Roy Fravel, an employee of petitioner and Petitioner's predecessor in interest, the St. Louis-San Francisco Railway Company, brought this action under the Federal Employer's Liability Act, 45 U.S.C. §51, 35 Stats. 65, as amended (FELA), to recover damages for injury to his leg, back and shoulder which Respondent sustained while working as a laborer at Petitioner's Springfield, Missouri facility dismantling a damaged box car.

At trial, Respondent introduced evidence of Petitioner's negligence, which although contested was decided adversely to Petitioner by the jury. Respondent also presented evidence of the nature of his injuries, treatment, and surgery to repair the broken bones of his left leg, and that additional surgery would be required on his knee and might be required on his back and hip in the future. At the time of trial Respondent was still working for Petitioner and had returned to work two years earlier following his convalescence. On the issue of damages, Respondent indicated that while he was still working he could not do all of the things he used to be able to do prior to the accident, that he would be required to be off work in the future for medical treatment, that he might not be able to return to work thereafter, that his injuries were painful, and that he walked with a limp since the leg bones healed in a bowed fashion.

Respondent's counsel argued that Respondent should be compensated for the future medical treatment, for possibly not

being able to work in the future and for pain and suffering, and the jury should use its common sense to determine how long Respondent would be permitted to continue working when the case is over apart from what his physical condition is going to be in the future.

At the close of the trial, the judge instructed the jury, among other things, that if they found for the plaintiff (respondent), they "must award the plaintiff such sum as you believe will fairly and justly compensate the plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future..." The jury was also instructed to diminish the award in proportion to the amount of plaintiff's (respondent's) contributory negligence, if any. The jury returned a verdict of $1,276,000.00.

HOW THE FEDERAL QUESTIONS WERE PRESENTED

Petitioner asserted its federal claims at every level of the Missouri Court System.

1. At trial Petitioner's counsel twice objected to the argument of Respondent's counsel to the effect that Petitioner would fire Respondent as soon as the trial was over. (Transcript at p. 634-635) (Appendix D). This point was preserved by Petitioner's Motion for a New Trial., paragraph 33 (Appendix E) and as Point II of its Brief before the Missouri Court of Appeals, Eastern District, (Appendix F) and Point I of its Motion To Transfer to the Missouri Supreme Court (Appendix H).

2. At trial Petitioner's counsel objected to the exhibition and demonstration of Respondent's injuries and scars before the jury and moved for a mistrial thereafter (Transcript at p. 460 and Transcript at p. 508) (Appendix D). Like Point I above, this objection and Motion for New Trial were preserved in Petitioner's Motion for New Trial, paragraph 24 and 25, (Appendix E) and Point I of its Brief before the Missouri Court of Appeals,

Eastern District (Appendix F) and in its Motion for Rehearing Point II (Appendix G) and Point II of its Motion for Transfer to the Missouri Supreme Court (Appendix H).

3. At trial the Petitioner's counsel objected to Instruction Number 11 (M.A.I. 8.02) (see Appendices I and J) and suggested that it was error to omit the word "direct" from the Instruction. This error was preserved by Paragraph 17 of Petitioner's Motion for New Trial (Appendix E) and in Point V of Petitioner's Brief before the Missouri Court of Appeals (Appendix F). Similarly, Petitioner raised the unconstitutionality again in its Motion for Rehearing (Appendix G) and in its Motion to Transfer to the Supreme Court (Appendix H).

REASONS FOR GRANTING THE PETITION

1. The Missouri Courts Should Be Ordered To Follow The Clear Decisions Of This Court And Other Federal Courts And Be Prohibited From Denying Petitioner Its Rights Under The Federal Employers' Liability Act, 45 U.S.C. §51, 35 Stat. 65, As Amended, By Permitting Respondent To Argue And The Jury To Consider The Future Possibility That Petitioner Would Fire Respondent.

In *Andrews v. Louisville & Nashville Railroad Company,* 406 U.S. 390 (1972), this Court held that a discharged employee could not challenge the propriety of his termination in court because the Railway Labor Act, 45 U.S.C. §§151-188, vested exclusive jurisdiction over such "minor disputes" in the National Railroad Adjustment Board. The Court of Appeals for the Eighth Circuit recently applied the *Andrews'* preemption doctrine to dismiss a claim by former employees that they were discharged in retaliation for filing suits for personal injuries under the Federal Employers' Liability Act, 45 U.S.C. §§51-60. *Landfried v. Terminal Railroad Association of St. Louis,* 721 F.2d 254 (8th Cir. 1983). In addition, it is well-settled that punitive damages are not recoverable under a FELA action. *Kozar v. Chesapeake & Ohio Railway Company,* 449 F.2d 1238 (6th Cir. 1971).

Respondent's attorney, while conceding in the Missouri Court of Appeals that the above principles were correct statements of the law, nevertheless disregarded the law's mandates as he argued these precise issues in his summation. Counsel urged the jury to "[u]se your common sense" to determine how much longer the railroad would 'permit' Respondent to work for reasons "apart from...his physical condition." (Tr. 634). The inference to be drawn from these remarks was quite clear: the railroad would fire Respondent in retaliation for the exercise of his FELA rights as soon as the trial ended, and the jury should compensate Respondent and punish Petitioner for such action. The teachings of *Andrews, Landfried,*

Kozar and a host of other cases, however are equally clear: the propriety of a discharge and punitive damages therefor are issues which simply have no place in any state or federal judicial proceeding. Preemption should apply with even stronger force when, as here, a discharge has not in fact occurred or been threatened.

The Missouri Court of Appeals ignored the decision of the United States Court of Appeals from the Second Circuit in *Sharkey v. Penn Central Transportation Company,* 493 F.2d 685 (2d Cir. 1974). *Sharkey,* like the instant case, involved only an action for damages under the FELA. Unlike Respondent, however, plaintiff Sharkey had actually been discharged from his employment at the time of trial, ostensibly for his responsibility in the train wreck which gave rise to his FELA claim. An investigation had been held under the Railway Labor Act, the discharge upheld and an administrative appeal was pending at the time of trial. The trial court permitted plaintiff's counsel to introduce evidence that the plaintiff had been discharged "to let the jury know why this man did not go back to work." 493 F.2d at 688. In addition, plaintiff's counsel was allowed to argue in closing about the lost wages resulting from the discharge. 493 F.2d at 688. The jury returned a verdict of $125,000.00 which the trial court reduced by remittitur to $93,750.00. 493 F.2d at 687-688. The Court of Appeals for the Second Circuit found that the bias toward the plaintiff created by the testimony and evidence concerning the discharge had not been neutralized by a cautionary instruction advising the jury to disregard the discharge in its deliberations. The court then held that the damage award "was unconscionable and reflected a prejudice against the carrier, exacerbated by an intemperate summation which resulted in a punitive verdict." 493 F.2d at 688-689. Finding the remittitur to be also without adequate basis, the court reversed and remanded the cause for a new trial. 493 F.2d at 689.

Federal law, as opposed to the law of the State of Missouri, governs the propriety of counsel's argument to the jury in this

FELA case. *Sharkey v. Penn Central Transportation Company,* 493 F.2d 685, 689 (2d Cir. 1974); *Veargain v. National Dairy Products Corp.*, 317 F.2d 779, 780 (8th Cir. 1963); *Illinois Central Railroad Company v. Staples,* 272 F.2d 829, 834 (8th Cir. 1959). Therefore, the decision of the United States Court of Appeals in *Sharkey* is controlling precedent and mandates the reversal of this cause.

The Missouri Court of Appeals, in upholding the trial court's denial of relief to Petitioner, believed that the remarks of Respondent's counsel were a proper response to statements previously made by witnesses and counsel on Petitioner's behalf. This belief was based, however, on an inadequate examination of the substance of the respective argument and upon an overly broad interpretation of the position of Petitioner. It is true that Petitioner had, prior to closing argument, introduced testimony to the effect that the Respondent could, because of his seniority and despite his injuries, continue working for the railroad until his retirement. This evidence was, of course, highly relevant to the issue of damages for future wage loss and was perfectly proper in this FELA case. In addition, this testimony occurred after the Respondent's attorney attempted to establish that the Respondent would incur insignificant earnings loss in the future as a result of his injuries. Thus, the testimony and argument of Petitioner were in fact responses relating to the Respondent's *ability* to work in the future and *not,* as thought by the Court of Appeals, an initial introduction of the likelihood that Respondent would, apart from his physical condition, continue to work for the railroad. At no time prior to Respondent's attorney's closing argument was this punitive, false, and prejudicial issue even alluded to. Indeed, under the FELA and the Railway Labor Act's preemption doctrine, the issue could not be addressed. Therefore, in accordance with basic evidentiary principles, counsel's assertions were totally unsupported by the evidence and should have been excluded on that basis.

The retaliatory discharge, which in the words of Respondent's counsel was a certainty, has not taken place. Instead, Respondent remains employed by the railroad as a laborer and at no time has a discharge even been threatened. The requirement of basic truth and fairness on the part of counsel has been abrogated in this case and this Court should act to insure that the integrity of advocacy remains unblemished.

It is clear that the Petitioner's rights as guaranteed by the United States Constitution, the FELA and the Railway Labor Act were violated when the trial court allowed the unlawful and unsubstantiated accusations made by Respondent's counsel to remain on the record and to influence the jury. The action of the Missouri Court of Appeals then sanctioned this error of law. Petitioner is entitled to a fair trial under the Constitution. Respondent's summation could have had no other possible impact than to substantially prejudice the minds of the jurors against the corporate defendant. The FELA makes an employer liable for compensatory damages resulting from death or injury occassioned by its negligence. In this case the court authorized the jury to disregard FELA damage law and award either substantial punitive damages on the basis of speculative, prospective misconduct or, at the very least, a greatly inflated amount for future lost earnings upon the erroneous belief that Petitioner could, and indeed would, fire Respondent. Finally, the Railway Labor Act guarantees to carriers and employees alike that their conduct will be judged solely upon the basis of the collective bargaining agreement in an administrative proceeding. Here, emotion, as opposed to the contract, and the jury, as opposed to the Adjustment Board, resolved a dispute which existed only in the minds of Respondent and his attorney.

Because the important rights guaranteed to the Petitioner under the federal Constitution and statutes were totally disregarded in the trial of this cause, this petition should be granted.

2. The Missouri Courts Should Be Directed To Correct Reversible Error When They Allowed The Respondent To Inflame The Jury Through An Exhibition And Demonstration Of His Injuries And Thereby Deny Petitioner Due Process And Equal Protection Under The Law.

While it is generally held that the admissibility of demonstrative evidence lies within the discretion of the trial judge, the Courts in Missouri have developed several important limitations on this exercise of judicial discretion, but the Missouri Courts refused to apply those limitations to this FELA case. The limits of propriety were clearly exceeded here by the manner in which the demonstration of Respondent's physical condition and the exhibition of his surgical scars was conducted before the jury in the trial of this cause.

The Missouri Court of Appeals has said that automatic exclusion of demonstrative evidence is appropriate where the demonstration of injuries "elicit[s] cries of pain by the plaintiff, or induce[s] pitiful attempts at locomotion." *Happy v. Walz,* 244 S.W.2d 380, 383 (Mo.App. 1951). Throughout the demonstration, Respondent experienced severe pain, made obvious by his expression, utterances and the doctor's comforting remarks. The court reporter failed to record Respondent's audible signs of discomfort, but such error should not, contrary to the opinion of the Court of Appeals, bar the application of *Happy v. Walz* nor the granting of Petitioner's requested relief. The record does include the examining physician's comments, from which it is apparent that the demonstration did indeed "elicit cries of pain and pitiful attempts at locomotion." If the rule as announced in *Happy v. Walz* is still the law of the State of Missouri, then the Missouri Court of Appeals erred in refusing to apply it to this case upon the basis of a mistake of omission by the court reporter.

Missouri courts have consistently held that, where automatic exclusion under *Happy v. Walz* is inappropriate, the trial court is under a duty to insure that the demonstration's risk of pre-

judice is outweighed by its value in resolving a controvened issue in the case. *Fitzpatrick v. St. Louis-San Francisco Railway Co.*, 327 S.W.2d 801 (Mo. 1959); *Kickham v. Carter,* 314 S.W.2d 902 (Mo. 1958).

In *Fitzpatrick,* the Missouri Supreme Court cautioned that demonstrations or exhibitions which were irrelevant or unnecessary to the issues in a case and which would inject emotion into the proceedings should be avoided. Applying *Fitzpatrick* to this case, it is clear that the evidence should have been excluded. First, although the permanence of Respondent's injuries and disability was disputed, such was not and indeed could not be shown by the demonstration. The only "issue", therefore, to which the exhibition was relevant was Respondent's condition at the time of trial, a matter clearly not in dispute. Moreover, the Respondent's physician had completed two hours of extensive testimony regarding the Respondent's injuries, surgeries and prognosis immediately prior to the examination. As a result, the demonstrative evidence was extremely prejudicial and unnecessary as it concerned matters which had just been extensively and graphically covered.

Even if, as thought by the Court of Appeals, the demonstration was of some probative value to the jury, the trial court nevertheless abused its discretion by failing to balance this factor against the danger that prejudice would result. *Kickham v. Carter,* 314 S.W.2d 902 (Mo. 1958). The timing and manner in which the examination was planned and conducted certainly produced undue sympathy for the Respondent, which could not have been outweighed by the evidence's minimal value in the resolution of this case. Testimony concerning every aspect of the Respondent's condition had just been received. The cumulative nature of the demonstration alone was likely to create, and did in fact create, unfair passion and prejudice. In addition, the Respondent had been instructed by his attorney to wear shorts and an undershirt so that his surgical scars could be displayed throughout the entire demonstration. Finally, the Respondent's great difficulty in walking, his utterances and

grimaces in pain, all occurring directly in front of the jury box, surely had an overwhelmingly emotional effect on each juror.

The foregoing considerations leave one unmistakable impression: the examination and exhibition of Respondent's scars, injuries and disabilities were purposefully designed as a "blatant appeal to the emotions of the jurors." *Anderson v. Burlington Northern Railroad Company,* 651 S.W.2d 176 (Mo.App. 1983). The appellate court in *Anderson,* reversing a judgment for the plaintiff, condemned such action and advised that, on remand, "counsel and the trial court can be guided by the principles laid down in *Fitzpatrick*...which emphasized that a calculated effort to create sympathy or prejudice mandates a new trial unless it affirmatively appears that no prejudice in fact resulted." 651 S.W.2d at 813.

Because there has been no showing that the verdict was not the result of the extreme prejudice created by the improper method of presenting the demonstrative evidence in this case, the Missouri courts erred by failing to vindicate the rights of Petitioner, for which reason this petition should be granted. This error constitutes a denial of equal protection and due process under Amendment XIV of the United States Constitution by permitting against an FELA defendant, in this case Petitioner, what would not be permitted against non-FELA defendants, in Missouri courts. This petition should be granted to correct that error.

3. The Missouri Supreme Court Should Be Ordered To Cease Discriminating Against Federal Employers' Liability Act Defendants By Using A Different Measure Of Damages In FELA Cases Than In All Other Personal Injury Cases.

Originally, under the Missouri Approved Instruction Practice (hereinafter called "M.A.I."), the damage issue in all cases, including FELA cases, was submitted under M.A.I. 4.01 which permits the damages that plaintiff has sustained or will sustain "as a direct result of the occurrence mentioned in the

evidence." However, in 1978, the Supreme Court Instruction Committee submitted and the Supreme Court approved M.A.I. 8.02. M.A.I. 8.02 is expressly limited to FELA cases. By its terms, FELA defendants are liable for any damages plaintiff has sustained or will sustain "as a result of the occurrence mentioned in the evidence." In short, the word "direct" has been omitted. That is the only difference between M.A.I. 4.01 and 8.02. The Committee's comment indicates the Committee has concluded that the omission of the word "direct" is required by the correct substantive law. The Committee's conclusion is wrong. The most cursory reading of the cases cited by the Committee in its comment reveals that there is no foundation, no legal grounds whatsoever, for the Committee's conclusion.

In *Brown v. St. Louis Public Service Company*, 421 S.W.2d 255 (Mo.banc 1967), the Supreme Court specifically held that the omission of the word "direct" from M.A.I. 4.01 permits recovery for all damages, both direct and indirect, l.c. 259 [4]. In short, the omission of the word "direct" permitted consequential, speculative, and conjectural damages, and that it was error to omit the word in that non-FELA case.

The Federal Employers Liability Act, 45 U.S.C.A. §51, does not authorize railroad workers to recover "indirect damages". The FELA provides that railroads "shall be liable in damages to any person suffering injury...for such injury...resulting in whole or in part from the negligence...such carrier". Section 51 says defendant is liable in damages for "*injuries*" resulting in whole or in part from its negligence. Section 51 does not say that defendant is liable for *indirect damages* resulting in whole or in part from its negligence. In short, defendant is liable for plaintiff's damages which are a proximate result of plaintiff's injuries. Those injuries, in turn, must have resulted either wholly or partly from defendant's negligence. It is a two-step legal theory permitting recovery where only the thinnest of causal reationships exists between defendant's negligence and plaintiff's injuries. That very thin causal relationship is unique to cases arising under the FELA and is a substantial departure

from the common law. The second step of the theory, however, involves the damages which flow from the injuries. Those damages must be as a proximate result of the injuries. The FELA is not authority permitting those damages to be of an indirect, consequential, speculative, or remote nature.

One of the best examples of the relationship between injuries and damages under the FELA is found in *Holladay v. C. B. & Q. R.R. Co.*, 255 F.Supp. 879 (USDC Iowa, 1966). There, the Court found plaintiff's illness (i.e., his injury) to be a proximate cause of defendant's negligence, l.c. 886, 887 [17] and [24]. The Court then analyzed several items of damage claimed by plaitiff. The Court rejected plaintiff's claim that his full wage loss was a proximate result of his illness, l.c. 887 [22]. On the other hand, the Court accepted plaintiff's claim that his hospital and medical treatment was a proximate result of his injury, l.c. 887 [24]. This case illustrates that there must be a proximal relationship between plaintiff's injuries and defendant's negligence and between plaintiff's injuries and the damages he claims as resulting from his injuries. See also *International Great Northern Ry. Co. v. King*, 41 S.W.2d 234 (Texas Appeals, 1931), l.c. 235 [1].

Instruction Number 11 in this case, M.A.I. 8.02, contains no such limitation. The instruction has no limiting or restricting element whatsoever. Whatever the jury conceives as damages "as a result" of the occurrence is fair game. There are no limitations, no guidelines. The instruction permits the utmost kind of speculative and remote damages.

The cases cited in the Missouri Supreme Court Instruction Committee's comment on M.A.I. 8.01 does not stand for the proposition that the FELA permits speculative, conjectural, and remote damages. *Crane v. Cedar Rapids & I.C. Ry. Co.*, 395 U.S. 164, 166, clearly states that the difference between the FELA and common law causation is that, under the FELA, plaintiff need only prove that his *injuries* resulted in whole or in part from defendant's negligence. *Rogers v. Missouri Pacific*

R.R. Co., 352 U.S. 500, 506-507, clearly stands for the same proposition; namely, whether employer negligence played any part, even the slightest, in producing the *injury or death* for which damages are sought. *Rogers* certainly did not wipe out the necessary proximal relationship between injuries and damages as is done by M.A.I. 8.02. The same is true of *Wilmoth v. C., R.I. & P. R.R. Co.*, 486 S.W.2d 631 (Mo. 1972), where the Court made clear that FELA causation goes to the relationship between, in that case, the employee's death and negligence of the railroad. *Wilmoth* does not furnish authority for the proposition that the jury should be given unrestricted rein to speculate and conjecture about damages that they perceive as resulting from the "occurrence" mentioned in the evidence.

The case of *Gallick v. B. & O. R.R. Co.*, 372 U.S. 108 (1963), sheds further light on the issue. There, the special interrogatories of the trial court required a proximal causation between railroad negligence and plaintiff's injuries, l.c. 372 U.S. 110, 111. The Supreme Court set out in full in its Opinion those proximal cause requirements between injury and negligence and this expressly spoke in terms of the jury properly finding "that there was a causal relationship between the railroad's negligence and petitioner's *injuries*...", l.c. 117 (emphasis supplied). This case in no wise permits the jury to engage in gross speculation as to what damages may have resulted from the "occurrence". It speaks clearly in terms of negligence as being a proximate cause of plaintiff's *injuries*, of plaintiff's *injuries* resulting in whole or in part from defendant's negligence.

The failure to continue the use of the word "direct" in the FELA damage instruction raises certain constitutional objections applicable to all FELA defendants in Missouri. Those constitutional objections are that defendant is denied its rights under the equal protection of law provisions of the United States Constitution (Fourteenth Amendment); that defendant is denied its property without due process of law in violation of the United States Constitution (Fourteenth Amendment); and

that defendant's rights under the FELA, the right to be found liable in damages that are directly or causally related to the plaintiff's injuries, has been abridged by Rule 70.02(b) of the Missouri Supreme Court that requires the use of Missouri Approved Instruction 8.02, and this instruction, 8.02, and thereby defendant's rights under the supremacy of law provisions of the United States Constitution (Article 6, Clause 2) have been violated.

The one element that gives rise to all of the constitutional violations against defendant is that there simply is no reason to discriminate against FELA defendants in the manner done by M.A.I. 8.02, the use of which is compelled by Rule 70.02(b). Defendant's burden of damages has been significantly increased, for no valid legal reason, just by virtue of the fact that it is subjected to M.A.I. 8.02.

Instruction No. 11, M.A.I. 8.02, is clearly an erroneous instruction subjecting this and other FELA defendants to a tremendously greater burden in damages than is permitted by federal law.

This error is evident by the inordinately large verdict of One Million Two Hundred Seventy-Six Thousand ($1,276,000.00) Dollars awarded in this case.

For these reasons, this Petition for Certiorari should be granted to correct the error created and perpetuated by the Missouri Supreme Court's Approved Instructions.

CONCLUSION

For the reasons stated herein, and most importantly because the Missouri Courts consistently refuse to follow the substantive Federal Employers' Liability Act decisions of this Court and other Federal Courts except when specifically directed to do so on a case by case basis, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION TWO

No. 47024

RAY FRAVEL,
Plaintiff-Respondent.

vs.

BURLINGTON NORTHERN RAILROAD,
Defendant-Appellant.

Appeal from the Circuit Court of the City of St. Louis
Hon. Floyd McBride, Judge

OPINION FILED: April 24, 1984

Plaintiff workes as a laborer for defendand railroad. On March 22, 1979, railroad assigned him to dismantle a damaged boxcar. During the course of the dismantling process, plaintiff sustained severe and permanent injuries when he was crushed by a one-half ton steel end plate.

Plaintiff brought an action under the Federal Employers Liability Act, 45 U.S.C. § 51 *et seq.*, alleging railroad's negligence by reason of res ipsa loquitur doctrine. An extensive trial followed, conducted by a jury verdict in favor of plaintiff for $1,276,000. Judgment was entered accordingly. Railroad appeals. We affirm.

Railroad raises five points. Point four concerns the giving of an instruction patterned on MAI 24.01. Point five relates to the use of an instruction based on MAI 8.02. Both instructions are required; both have recently been approved. See Bair v. St.

Louis-San Francisco Ry. Co., 647 S.W.2d 507, 510-511 (Mo. banc), *cert. denied sub. nom.* Burlington Northern, Inc. v. Bair, ____ U.S. ____, 104 S.Ct. 107 (1983); Dunn v. St. Louis-San Francisco Ry. Co., 621 S.W.2d 245, 255-56 (Mo. banc 1981), *cert. denied,* 454 U.S. 1145 (1982). No further comment need be made concerning these instructions.

Plaintiff suffered multiple abrasions, contusions, and fractured bones from being crushed and pinned beneath the end plate. In addition his right shoulder was dislocated and his left thigh was punctured, resulting in more than two pieces of bone.

Plaintiff's left leg was initially placed in traction. Two days after the injury an orthopedic surgeon decided to operate. A traction pin, which is a stainless steel threaded wire, was placed on the left tibia just below the knee. The left femur was broken in three large, jagged fragments which caused considerable bleeding into the muscles of the thigh.

Following the operation plaintiff again was placed in traction and remained so until May 16, when the traction pin was surgically removed and a cast applied. Healing was slow, however, because little bone formation between the breaks occurred. After the second operation plaintiff remained in the hospital twelve more days for intense physical therapy. When plaintiff was discharged on May 28, he was placed on exercise programs but could place no weight on the left leg. X-rays taken then showed small amounts of new bone formation but also indicated a bowing of the left leg.

Follow-up visits to the orthopedic surgeon revealed continued bowing of the left leg, indicating the fracture sites had not properly solidified. Twice daily physical therapy was begun on July 16 and continued until August 1.

During the next few months plaintiff visited his doctor several times. On October 25, the doctor discovered a one-half inch shortening of plaintiff's left leg. The doctor advised plaintiff to

undergo a "quadriceps plasty" on the left thigh. In this operation to increase the knee joint motion, the muscles are stripped from the bone. During the operation the surgeons found plaintiff's kneecap had become fused to the femur. This condition was also corrected.

Immediately after the operation plaintiff's knee joint enjoyed 90° of flexion. A little over a week after discharge, however, plaintiff's knee lost 40° of flexion. X-rays revealed the kneecap was again becoming fused with the femur. The doctor recommended removal of the kneecap. Thus, plaintiff underwent a fourth operation.

After the kneecap was removed on December 18, plaintiff began experiencing pain in the knee and difficulty sleeping. Over the next few months the pain gradually subsided and plaintiff's ambulation increased. His left leg, though, remained shorter than his right leg.

By June 17, 1980, plaintiff was complaining of occassional pain about the back of his right shoulder. Spinal x-rays evidenced a deterioration of the disc space between the fifth and sixht vertebrae. Plaintiff's condition remained relatively unchanged until he was able to return to work on December 3, 1980.

In December of 1980 plaintiff was examined by a second orthopedic surgeon. This surgeon testified at trial as to the pain plaintiff experienced in his neck, right side, and shoulder. This pain combined to weaken plaintiff's ability to grip things with his right hand. Due to the shortened left leg, plaintiff's pelvic area became tilted to one side resulting in a rotational type limping gait. The surgeon opined that if the disc space in plaintiff's spine continued to deteriorate, surgery would be required to relieve the extreme pain it would cause. The surgeon also noted arthritic changes about the left side of the hip and felt a hip replacement would probably be needed. The doctor also thought a total knee replacement operation would be called for in the future.

Railroad's first complaint concerns the exhibition of plaintiff's injuries to the jury. After the second orthopedic surgeon had testified for nearly two hours, referring to x-rays taken of plaintiff and various anatomical charts and models, plaintiff's counsel proposed to display plaintiff to the jury wearing shorts and a T-shirt. During a conference at the bench, railroad objected to any demonstration of plaintiff, claiming it would inflame the jury and prove nothing, the injuries having been adequately testified to by the witnesses. The trial court overruled the objection upon learning plaintiff's intention was to display his left leg, including the deformed kneecap area, his tilted hip, the attending scars, and restricted movement in the leg.

The jury was allowed to view plaintiff walk in the courtroom as the doctor pointed out his injuries. Then the doctor had plaintiff lie down before the jury. The transcript indicates the following:

> A. [Surgeon] There is not much what I want to show here. There is just two things. It doesn't give me much room. Come on down a little farther. Are you comfortable? Okay. Lining his hip up as he should, putting the kneecaps up, you can see where the foot goes that way. The motion of the knee—let me have it, Ray. He should just straighten it all the way. He should hyper-extend which he does straighten it out. He doesn't—he's got a little flexion in bending it. That's it. I'm sorry to hurt you, Ray. That's as far as that knee will go. It is fixed at that point. Okay, Ray, let me just have it again for a second. Bend your knee gently. I'll be as easy as I can about the rotation of the hip. We were talking about external rotation. That's it. It won't go internally. He'll go, but it hurts. That's very painful as opposed to this, okay? There is a significant difference. Okay, Ray, I think that's all I need.

Plaintiff's counsel then asked the doctor to sepcifically point out the scars from plaintiff's surgery, the area of the missing

kneecap, and the tilt of the hip. Railroad lodged no objections during the demonstration and shortly afterward proceeded to cross-examine the doctor.

During an in-chambers conference at the close of plaintiff's case, railroad requested the opportunity to make a record. Its attorney moved for a mistrial based on the fact the evidence presented by the demonstration of plaintiff's injuries was merely repetitive and therefore served only as an appeal to the passions and prejudice of the jury. The request for a mistrial was denied.

At the outset it is important to note the objection made by railroad and the reason assigned for it. Specifically, railroad objected to *any* demonstration of plaintiff's injuries on the grounds a display of the injuries would be cumulative to and repetitive of the testimony of the witness doctors.

"A mere demonstration 'of the nature and extent of plaintiff's injuries' is not in and of itself improper or prejudicial in a personal injury suit. The nature and extent of plaintiff's injuries are essential to his proof and necessary for the jury's determination." Happy v. Walz, 244 S.W.2d 380, 383 (Mo. App. 1951).

The admission of demonstrative evidence is a matter entrusted to the sound discretion of the trial court. The exhibition of a plaintiff's injury is highly relevant; since the defendant is charged with having caused the injury, the jury should be able to see, in a dignified manner, what the defendant has done to the plaintiff. Certain exhibitions, however, are deemed improper when designed merely to arouse antipathy against the defendant, sympathy for the plaintiff, or where they are irrelevant as to any fact issue in dispute. Taylor v. Kansas City Southern Ry. Co., 266 S.W.2d 732, 736 (Mo. 1954).

The first two instances of improper demonstration of a plaintiff's injury concern the manner in which the exhibition takes place. Elicit-??????????

an ocular prosthesis before the jury to display it are condemned because they seek to dramatize the plaintiff's injuries in a manner calculated to inflame the jury. Happy v. Walz, *supra;* Anderson v. Burlington Northern R.R. Co., 651 S.W.2d 176 (Mo. App. 1983). Demonstrative evidence excluded because of its lack of probative value on a disputed fact issue often involves unduly detailing the surgical procedures associated with a plaintiff's injury. See Taylor v. Kansas City Southern Ry. Co., *supra;* Kickam v. Carter, 314 S.W.2d 902 (Mo. 1958).

When the offered demonstrative evidence bears some relevancy to the issues tried, the trial court's decision to admit it is arrived at by balancing potential for inflaming the jury against the aid of the evidence in resolving the disputed issue. We find no error in the present case by the trial court allowing plaintiff to show the jury his injured leg and restricted mobility. They are part of the actual damage he suffered by reason of railroad's negligence. It would have been error not to have permitted such an exhibition.

Most of railroad's point on appeal, however, does not concern whether or not the fact of plaintiff's injuries should have been displayed, but the manner in which the exhibition took place. From the portion of the transcript set out above, railroad asks us to infer plaintiff cried out and grimaced when the doctor manipulated his leg and hip. First, we are not willing to make such an inference based on the record before us. Had counsel wished to raise on appeal non-verbal actions occurring at trial, the proper method is to make a record with an offer of proof. Second, even if a record had been made of plaintiff crying out in pain or grimacing, railroad presented no objection concerning such acts to the trial court. If railroad did not find the manner in which plaintiff's injuries were demonstrated objectionable at trial, it can not assert an objection on appeal.

Next railroad claims reversible error in plaintiff's counsel suggesting during closing argument the railroad might fire plaintiff

in the future. Railroad's counsel, in his closing argument, stated plaintiff would be working with the railroad until his retirement. Thus, plaintiff's counsel was merely countering railroad's argument by saying plaintiff had no guarantee of continued work at the railroad. Plaintiff's counsel also suggested plaintiff might not be able to continue work.

The trial court enjoys broad discretion in controlling closing argument. Lewis v. Bucyrus-Erie, Inc., 622 S.W.2d 920, 925-26 (Mo. banc 1981). Having opened the door by suggesting plaintiff would be working for it until his retirement, railroad is now in no position to complain. See Doyle v. St. Louis-San Francisco Ry. Co., 571 S.W.2d 717, 725 (Mo. App. 1978).

Finally, railroad argues the verdict of $1,276,000 was excessive, induced by the passions, biases, and prejudices of the jury. The first portion of its attack relates the alleged excessive verdict to the trial errors ruled against railroad above. Since the excessiveness of the verdict, standing alone, is insufficient to show bias or prejudice necessitating a new trial, we rule against railroad on this portion of its argument. Koehler v. Burlington Northern, Inc., 573 S.W.2d 938, 944-45 (Mo. App. 1978).

The second portion of railroad's point urges error in the failure of the trial court to order a remittitur under the "rule of reasonable uniformity." Johnson v. Missouri-Kansas-Texas R.R. Co., 374 S.W.2d 1, 6 (Mo. 1963).

Remittitur prevents awards exceeding fair or reasonable compensation. Since no two cases are identical, each must be decided on its own facts. *Koehler, supra.* All reasonable presumptions are indulged in favor of the jury's verdict, with the evidence viewed in a light favorable to it and inconsistent evidence disregarded. Woodruff v. Illinois Central Gulf R.R. Co., 518 S.W.2d 712, 718 (Mo. App. 1974).

Factors which help determine the appropriateness of the award include plaintiff's age, the nature and extent of his in-

juries, his losses, diminished earning capacity, inflation, the permanency and degree of disability, the amount of pain and suffering, plaintiff's education, and awards in similar cases. *Koehler, supra.* If substantial evidence supports the verdict, it must be affirmed. Morris v. Israel Bros., Inc., 510 S.W.2d 437 (Mo. 1974).

Plaintiff was 49 at the time of his injury. His injuries, described above, were extensive. Plaintiff suffers from a permanent disability to his leg and a permanent limp. The prognosis is he will have to undergo several operations in the future as well as the four he has had so far. The injuries have caused a great deal of pain and will continue to cause plaintiff pain. Plaintiff's future ability to work is questionable and the wages lost while recuperating total $30,000.

We first note the trial court was not of the opinion the verdict was excessive. To obtain relief in this court, railroad has the burden of showing the verdict is glaringly unwarranted so as to shock this court's conscience. *Koehler, supra* at 946; *Dunn, supra* at 255-56. In viewing all the evidence with deference to the jury's verdict, we cannot say the verdict is outrageously excessive.

Judgment affirmed.

/s/ Robert E. Crist
Presiding Judge

/s/ James A. Pudlowski Judge Concurs

/s/ Paul J. Simon, Judge Concurs

APPENDIX B

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

TO: ATTORNEYS OF RECORD

FROM: JAMES A. ROCHE, JR., CLERK

DATE: JUNE 1, 1984

Please be advised that the following Motions for Rehearing and/or Transfer to Supreme Court have been DENIED AS OF JUNE 1, 1984

No. 45725 - Goodman vs. St. Louis Children's Hospital

No. 45824 - State of Mo. vs. Larry L. Hayman

No. 46748 - State of Mo. vs. Andrew Kinnard

No. 46758 - Frye, et al vs. CB Inc., etc.

No. 46899 - State of Missouri vs. Kayser

No. 47024 - Fravel vs. Burlington Northern Railroad Co.

No. 47025 - Boatmen's Bank of Jeff. Co. vs. Wulfert, et al

No. 47122 - State of Mo. vs. Charles Mayes

No. 47154 - State of Mo. vs. Mark Steffenhagen

No. 47521 - State of Mo. vs. Darnell Moton

No. 47523 - State of Mo. vs. Allen Winter Leonard

APPENDIX C

NO. 66099

IN THE SUPREME COURT OF MISSOURI
No. ED #47024

May Session, 1984

Ray Fravel,
Plaintiff-Respondent,

vs.

Burlington Northern Railroad,
Defendant-Appellant.

TRANSFER

Now at this day, on consideration of Defendant-Appellant's *Application to transfer the above entitled cause from the* Eastern District *Court of Appeals, it is ordered that said application be, and the same is hereby denied.*

Rendlen, C.J., and Gunn, J., not participating.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May *Session thereof, 19* 84, *and on the* 17th *day of* July *19* 84, *in the above entitled cause.*

Given under my hand and seal of said Court, at the City of Jefferson City, this 17th *day of* July, 1984.

/s/ Thomas F. Simon *Clerk*

/s/ Becky Judd *D.C.*

APPENDIX D

Excerpts from Transcript

[460] Q. Doctor, I have told you—I have asked Ray to wear a pair—put on a pair of gym shorts and a T-shirt and if he disrobes can you actually demonstrate his injuries and his limitations to the Ladies and Gentlemen of the Jury? I can show some physical findings, not the full extent.

MR. BUESCHER: If it please the Court, may we approach the bench? This may be a good time for the morning recess.

THE COURT: You may approach the bench.

(A discussion was had at the bench out of the hearing of the Jury.)

MR. BUESCHER: I would object to any demonstrations of the patient as being only intended to inflame the jury, Your Honor. It will prove nothing for the benefit of the jury. Everything that he would show has already been demonstrated —testified to. The only purpose of any viewing of the injury of this man would be, sir, only to inflame them. It would so highly prejudicial as to in this case, and as to the harm of this trial and I would object to it, Your Honor.

THE COURT: I assume your intention, Mr. Friedman, is to have the Doctor display the left leg of the Plaintiff and with he's testified to relative to the patella, the upper and lower **[461]** leg.

MR. FRIEDMAN: Right, and the hip.

THE COURT: And the hip.

MR. FRIEDMAN: The scarring and the knee restriction and movement and the obvious and the actual deformities as well as the actual pelvic tilt which is visible.

THE COURT: Objection is overruled. However, I'll—the Doctor's been on the stand approximately an hour and forty-

five minutes. So we'll take our morning recess at this point since there will be some time involved for the Doctor's testimony to proceed.

* * * * *

[508] IN CHAMBERS CONFERENCE

THE COURT: You may proceed, Mr. Buescher.

MR. BUESCHER: I just want to make a slight record, Your Honor, again following the Plaintiff's case before the jury. I would move for a mistrial based on the fact that the evidence that was adduced during that demonstration to the jury was merely repetitive and therefore, the evidence served only to appeal to the passion and prejudice of the jury and unfairly and improperly inflamed them to prejudice the Defendant.

THE COURT: Defendant's motion for mistrial is overruled.

* * * * *

[634] (by Mr. Friedman) He only has one opportunity. You have one opportunity to compensate him for all of the injuries and damages that he sustained to this point and that he'll sustain in the future, and they say to you, he's got a job? Have they given you any guarantees up here, any guarantees that Ray's going to be permitted to continue working when this case is over? **[635]** Use your common sense. Use your common sense. Apart from what he knows his physical condition is going to be in the future.

MR. BUESCHER: Your Honor, I'll object to that. The man's job and his entire position is to be controlled by the bargaining agreement. I resent—I greatly resent counsel's derogatory remarks on that issue.

THE COURT: Objection is overruled.

(by Mr. Friedman) What happens when this case is over. Use your—you know that's something that you take up to the jury

room besides these written instructions that have been given to you by the Court. Your good common sense, your personal experience in thirty, forty, fifty years of life, and use it. What type of work is Ray going to be able to do. What type of job is he going to be able to hold? Who is going to hire him? How long is this railroad going to continue permitting him to work?

MR. BUESCHER: Your Honor —

THE COURT: Pardon me?

MR. BUESCHER: I again—I must reiterate to the Court, Your Honor, these kind of slurs are ridiculous. It is not supported by the evidence that's all.

THE COURT: Objection is overruled.

* * * * *

APPENDIX E

Excerpt from Motion For New Trial

17. The plaintiff's damage Instruction No. 11, M.A.I. 8.02, was erroneously given by the court because it erroneously omits the word "direct" or some other limiting word or phrase such as "in whole or part" in the phrase "as a result of the occurrence." The federal common law pertaining thereto and the Federal Employers' Liability Act do not permit indirect or remote damages from defendant's negligence. They provide that the defendant shall be liable in *damages* for *injury* resulting in whole or in part from the negligence of the railroad. In short, instruction No. 8 and M.A.I. 8.02 are clear misstatements of the law permitting the jury to find defendant liable for indirect, remote, speculative and conjectural damages.

This instruction is limited by the M.A.I. Notes on Use, thus by Supreme Court Rule, to Federal Employers' Liability Act cases and, hence, is discriminatory against Federal Employers' Liability Act defendants. In compelling the use of said instruction, the Supreme Court of Missouri has deprived defendant of its rights under the Commerce Clause and equal protection of laws provision of the United States Constitution, Fourteenth Amendment, and Missouri Constitution, Article I, Section 2, and has deprived defendant of its property without due process of law in violation of defendant's rights under the United States Constitution, Fifth Amendment, and the Missouri Constitution, Article I, Section 10, and has denied defendant its rights under the Federal Employers' Liability Act, 45 U.S.C.A. Sections 51, et seq., in that defendant is liable in damages only for injury (or death) resulting in whole or in part from its negligence, in violation of defendant's rights under Article 6, Clause 2 of the United States Constitution.

Further, said instruction is vague, speculative and misleading, giving the jury a roving commission, in that it does not specify the elements of damages for which plaintiff may recover. Because of its vagueness, it permitted plaintiff in this case by the

admission of the actual jurors voting in plaintiff's favor to recover for speculative and unsupported damages, such as future inability to do his job, future wage loss, future disability, future surgery, future medical expenses, and future pain and suffering, all of which were alluded to in the evidence and arguments but unsupported by the evidence as elements of damages.

24. The trial court prejudicially erred by overruling defendant's objections to plaintiff's exhibiting himself before the jury clad only in shorts and t-shirt and undergoing demonstrative examinations by Dr. Banton during Dr. Banton's testimony which included the manipulation of plaintiff's left leg by Dr. Banton in such a way to apparently cause plaintiff pain which served only to inflame the passion and prejudice of the jury.

25. The trial court prejudicially erred by refusing to grant defendant's request for a mistrial following the exhibition of plaintiff clad only in shorts and t-shirt and of plaintiff's left leg and scars before the jury, and Dr. Banton's comments and testimony during same and the apparent infliction of pain on plaintiff by Dr. Banton by manipulation of plaintiff's left leg.

* * * * *

32. The trial court prejudicially erred by overruling defendant's objections to testimony by plaintiff and statements by plaintiff's counsel that plaintiff could be discharged or fired by defendant without cause.

33. The trial court prejudicially erred by overruling defendant's objections to repeated statements by plaintiff's counsel during closing argument that defendant would without cause fire or dismiss plaintiff as soon as this lawsuit was over. That such statements constitute reversible error is, and has been the rule, in F.E.L.A. cases for years, and such statements served only to inflame the passion and prejudice of the jury against defendant and no other reason or justification therefore existed.

* * * * *

APPENDIX F

Excerpts from Brief before Missouri Court of Appeals

POINTS AND AUTHORITIES

I.

The Trial Court Committed Reversible Error And Abused Its Discretion In Overruling:

(a) The Defendant's Timely Objection To The Plaintiff Clad Only In Shorts And T-Shirt With Left Leg And Scars Visible Before The Jury, Undergoing Demonstration Examinations By Dr. Banton During Dr. Banton's Testimony; And

(b) The Defendant's Motion For A Mistrial Immediately After The Plaintiff, Clan Only In Shorts And T-Shirt With Left Leg And Scars Visible Before The Jury, Had Undergone Demonstration Examinations By Dr. Banton During Dr. Banton's Testimony During Which The Plaintiff Experienced Pain And Made Sounds Before The Jury; And

(c) The Defendant's Motion For A New Trial Based On The Objections Made And The Request For A Mistrial On The Above-Stated Grounds;

Because The Demonstration Examinations Of The Plaintiff Described Above Were Designed And Calculated Only To Appeal To The Passion And Prejudice Of The Jury And To Inflame The Jury Against The Defendant In That:

(1) The Demonstration Examinations Were Only Cumulative As They Came At The End Of Dr. Banton's Testimony With Regard To All Of The Plaintiff's Injuries;

(2) There Was No Doubt That The Plaintiff Experienced Pain From His Injuries And Upon Attempts At Moving His Leg Beyond Certain Limits;

(3) The Plaintiff Made An Utterance Presumably From Pain During The Examination;

(4) There Was No Disputed Fact Issue About Whether The Plaintiff Was Injured Or Experienced Pain; And

(5) It Does Not Affirmatively Appear That There Was No Prejudice To The Defendant.

Anderson v. Burlington Northern Railroad Company, 651 S.W.2d 176 (Mo.App.E.D. 1983);

Fitzpatrick v. St. Louis-San Francisco Railway Company, 327 S.W.2d 801 (Mo. 1959);

Kickham v. Carter, 314 S.W.2d 900 (Mo. 1958);

Taylor v. Kansas City Southern Railway Co., 266 S.W.2d 732 (Mo. 1954);

Happy v. Walz, 244 S.W.2d 380 (Mo.App.K.C. 1951);

Willis v. City of Browning, 143 S.W. 516 (Mo.App. K.C. 1912);

Stokes v. Wabash R. Co., 197 S.W.2d 304 (1946);

Brown v. Moore, 248 S.W.2d 553 (Mo. 1952);

Jones v. Pennsylvania R. Co., 182 S.W.2d 157 (Mo. 1944);

Taylor v. St. Louis Public Service Company, 303 S.W.2d 608 (Mo. 1957).

II.

The Trial Court Committed Reversible Error In Overruling:

(a) The Defendant's Objection To Arguments By Plaintiff's Counsel That Defendant Would Fire Or Discharge Plaintiff As Soon As The Trial Was Over; And

(b) The Defendant's Motion For A New Trial Based On Said Objection To Improper Argument By Plaintiff's Counsel,

Because The Argument By Plaintiff's Counsel Was Entirely Improper In This Federal Employer's Liability Act Case And Designed Only To Appeal To The Passion And Prejudice Of The Jury And To Inflame The Jury Against The Defendant And To Inject Punitive Damages Into The Case, In That

(a) There Was No Evidence That Defendant Or Any Of Its Employees Had Attempted To Discharge Plaintiff From Its Employ Or Even Threatened To Do So, And

(b) Even If Such Evidence Had Existed It Could Not Have Been Properly Introduced In This Federal Employer's Liability Act Case Which Is Based Solely On Negligence, And May Not Include Punitive Damages, And All Such Discharge Disputes Between Railroad Employees And Rail Carriers Are Pre-Empted By The Provisions Of The National Railway Labor Act.

Junior S. Jackson v. Consolidated Rail Corporation, 717 F.2d 1045 (7th Cir. 1983);

Thomas L. Andrews v. Louisville & Nashville Railroad Company, et al., 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed. 95 (1972);

Kozar v. Chesapeake & Ohio Ry. Co., 449 F.2d 1238 (6th Cir. 1971);

John R. Sharkey, Sr. v. Penn Central Transportation Company, 493 F.2d 685 (2nd Cir. 1974);

Green v. Ralston Purina Company, 376 S.W.2d 119 (Mo. 1964);

45 U.S.C. §151 *et seq.*

V.

The Trial Court Committed Prejudicial Error In Using Damage Instruction M.A.I. 8.02, Instruction No. 11 In This Case, Because Said Instruction Omits The Word "Direct" Or Some Other Limiting Phraseology And The Use Of Said Instruction Being Limited By Missouri Supreme Court Rule To FELA Cases Denies This Defendant In This Case And Other FELA Defendants The Equal Protection Of The Law And Due Process Of Law To Which They Are Entitled And Further Is In Violation Of The Supremacy And Commerce Clauses Of The United States Constitution.

Dunn v. St. Louis-San Francisco Railway Company, 621 S.W.2d 245 (Mo. banc 1981);

Ricketts v. Kansas City Stockyards Company of Maine, 484 S.W.2d 215 (Mo. banc 1972).

APPENDIX G

Excerpts from Motion for Rehearing

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION TWO

No. 47024

RAY FRAVEL,
Plaintiff-Respondent,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendant-Appellant.

Appeal from the Circuit Court of the City of St. Louis
Hon. Floyd McBride, Judge

MOTION FOR REHEARING, OR IN THE ALTERNATIVE, FOR TRANSFER TO THE SUPREME COURT AND SUGGESTIONS IN SUPPORT THEREOF

Comes now defendant, Burlington Northern Railroad Company, and for its motion for rehearing, or in the alternative, for transfer to the Supreme Court informs and states to the Court as follows:

On April 24, 1984, Division Two of this Court filed its 6½ page slip opinion affirming the jury verdict of $1,276,000.00 and judgment thereon against the defendant-appellant in this case. Defendant-Appellant contends that Division Two of this Court overlooked and misinterpreted the following points which were raised on appeal:

I. REHEARING

1. The Court overlooked and misinterpreted the facts and the law with regard to Point II of defendant-appellant's brief which

asserted reversible error in overruling defendant's objections to arguments by plaintiff that defendant would fire plaintiff as soon as the trial was over and a motion for new trial also based upon that objection.

One of the rights granted to railroad employees is to have a secure job subject to only layoffs based on seniority. In short, they may not be fired without just cause and then only following investigations, if requested, and ultimate review in accordance with the provisions of the National Railway Labor Act. This fact is well known to counsel for plaintiff, Mr. C. Marshall Friedman, as his firm and he himself handles labor matters for the Brotherhood of Railway Carmen of the United States and Canada. In spite of this, he argued that the railroad could fire plaintiff in the future. This was done without reference to plaintiff's physical condition as is well recognized by the Court on page 5 of its slip opinion. Nonetheless, the Court overlooked this fact and thereby permitted plaintiff's counsel to argue that defendant-appellant might fire plaintiff sometime in the future. The Court's opinion, in short, permits, authorizes and encourages all attorneys in the future to argue falsehoods, assertions not supported by the record or the evidence or to assert anything whatever so long as it can remotely come within the vague term "fair retort." In the case at bar, counsel for defendant, indeed, argued that plaintiff could be working for the railroad until retirement because such, in fact, is the case and plaintiff is, in fact, guaranteed such rights under the National Labor Railway Act and such argument was supported by the evidence. Plaintiff's counsel's retribution to the argument is simply not based on fact or anything in the evidence and is contrary to the law and cannot be characterized as a fair argument, rebuttal or retort against an assertion that plaintiff can be working until retirement.

The only portion of the argument of plaintiff's counsel that could be considered a fair retort is that plaintiff's injuries are so severe that a physical inability to perform his work might be the basis of a medical discharge in the future by defendant-

appellant. However, the Court misinterpreted the law by concluding that that fact supported an argument that the railroad might fire plaintiff in the future for non-medical reasons. Such an argument is prohibited by Federal law as all Railway Labor Act matters are to be determined in accordance with that Act and not asserted in connection with an FELA action.

The Court's discussion of the argument of counsel for plaintiff, which is limtied to two paragraphs in this opinion, not only overlooks or misinterprets the federal law on the subject and denies defendant-appellant its rights under the Federal Employer's Liability Act and the National Railway Labor Act, but it further misinterprets existing Missouri law, permitting a misstatement of the law to stand thereby changing the entire course of the law of the State of Missouri on closing argument. This opinion of Division Two of the Court of Appeals, if allowed to stand as presently written, specifically authorizes the use in closing argument of false assertions that are not supported by the evidence or even suggested by anything in evidence. It also permits reference to actions that are prohibited by law and for which there are other exclusive remedies. The Court's misinterpretation of this point is obvious from the fact that nowhere in its opinion does the Court mention the lack of evidence on the point, the prohibition against arguing the point or injecting it into an FELA action, or anything suggesting that it is improper. The only cases cited by this Court in support of its two paragraph opinion on the matter are *Lewis v. Bucyrus-Erie, Inc.*, 622 S.W.2d 920, 925-926 (Mo.banc 1981) and *Doyle v. St. Louis-San Francisco Railway Company*, 571 S.W.2d 717, 725 (Mo.App. 1978). Neither of these two authorities deals with the argument of a matter that is not in evidence or properly inferable therefrom. In short, this opinion of Division Two of the Missouri Court of Appeals, Eastern District, establishes the right of counsel to argue legal and factual falsehoods under the guise of rebuttal. Such is not and should not by this case become the law of the State of Missouri.

This Court, by its opinion also overlooked the fact that plaintiff's counsel misstated the law and as to such misstatements the trial court has *no* discretion but should have sustained the objection of defense counsel. The trial court had the duty to "restrain and purge" such an argument and misstatement. *Heshion Motors v. Western Intern. Hotels,* 600 S.W.2d 526, 534 (Mo.App. 1980).

2. The Court's opinion, as it relates to Point I of Defendant's Brief, also overlooks the fact that by objecting to the whole of plaintiff's exhibition before the jury, defendant necessarily objected not only to the making but to the manner of the demonstration. Further, the Court misstates defendant's point when it said that defendant objected to "non-verbal" action in its brief. Defendant objects also to the "verbal utterances of plaintiff" which defense counsel had a right to assume were included in the record by the court reporter.

* * * * *

4. Defendant-Appellant further believes that this Court in its opinion overlooked the federal rights granted it under the F.E.L.A. and the U. S. Constitution because this Court failed to discuss the instructional errors set forth in Points IV and V of Appellant's Brief or mention the fact that the State of Missouri treats railroad defendants differently than all other defendants. The same instructions have repeatedly been held to be reversible error in non-F.E.L.A. cases are approved for use in an F.E.L.A. case. There is no legal basis for this type of classification and this point was overlooked in the court's opinion. (See age 1 of slip opinion). Further the authorities cited by this Court never once discuss the merits of Appellant's contentions but only say that M.A.I. requires that the instruction be given.

WHEREFORE, defendant-appellant prays this Court for a rehearing on the points set forth above in accordance with Supreme Court Rule 84.17 and for such other and further relief as may be just and proper in the premises.

* * * * *

APPENDIX H

Excerpt from Motion to Transfer

APPLICATION OF APPELLANT TO TRANSFER CAUSE FROM THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT, TO THE SUPREME COURT OF MISSOURI

Appellant Burlington Northern Railroad Company moves, pursuant to Rule 83.03, for the transfer of this cause from the Missouri Court of Appeals, Eastern District, to this Court and in support thereof informs the Court as follows:

I.

The Court of Appeals' opinion clearly overlooked the facts and the law with regard to Appellant's contention that the trial court committed reversible error by allowing the Plaintiff's attorney to argue, during his closing remarks, that the Plaintiff would be fired by Appellant after the trial. The Plaintiff's attorney's argument misled the jury as to the law and impermissibly introduced the element of punitive damages into the trial.

The law is clear that Plaintiff is precluded from making claims for possible future discharge and punitive damages, nevertheless these exact issues were put before the jury by those remarks, and, in effect, Plaintiff did indirectly what he could not do directly. The trial court's inaction, despite Appellant's timely objections and motion for new trial, sanctioned this error of law.

The Court of Appeals was obviously mistaken in its conclusion that Appellant "opened the door" on the issue of Plaintiff's future course of employment and, therefore, that Plaintiff's attorney's closing argument was a proper response. (Slip Opinion, p. 5-6.) His argument, however, was unsupported by any evidence; is improper under the law and false

besides! Division Two's opinion authorizes attorneys during argument to use false comments not based on any evidence to accuse the opposition of future law and contract violations. Such has not been, is not and must not become the law of Missouri or the FELA. This point alone supports an order to transfer.

II.

The Court of Appeals' affirmance of the trial court's refusal to sustain Appellant's objections, declare a mistrial or grant a new trial based on the inflammatory and prejudicial demonstration of the Plaintiff's injuries before the jury is contrary to the existing Missouri decisional law. (Slip Opinion p. 3-5). Where the trial court abuses its discretion by permitting clearly prejudicial conduct to continue over objection, appellate courts must then ensure that prejudice against the defendant has not in fact occurred and that the verdict was not the result of passion and sympathy for the plaintiff.

Here, the use of a medical exam demonstration clearly exceeded the outer limits of propriety, and was not "a mere demonstration of the nature and extent of Plaintiff's injuries" permitted by *Happy v. Walz*, 244 S.W.2d 380, 383 (Mo.App. 1951). First, it is clear from the surgeon's remarks during the demonstration that Plaintiff was experiencing difficulty of movement and emitted sounds and expressions of pain directly before the jury. Second, the demonstration occurred after extensive medical testimony as to the nature and extent of Plaintiff's injuries and disabilities and was therefore merely cumulative and repetitive. Finally, the demonstration's probative worth in resolving a disputed issue was quite minimal due to previous testimony and the fact that the Plaintiff's present condition was not in dispute.

The Plaintiff's attorney's use of demonstrative evidence was a blatant maneuver designed to invoke sympathy for his client in the minds of the jury. Under present law, "a calculated effort

to create sympathy or prejudice mandates a new trial unless it affirmatively appears that no prejudice, in fact, resulted." *Anderson v. Burlington Northern R.R. Co., supra,* at 183, referring to this Court's holding in *Fitzpatrick v. St. Louis-San Francisco Railway Co.,* 327 S.W.2d 801, 807-08 (Mo. 1959). Prejudice did result and this misapplication of existing law requires transfer and correction by this Court.

* * * * *

III.

The Court of Appeals' opinion in this case also raises questions of general importance. Specifically, the court's reaffirmation without discussion of the principle that M.A.I. should continue to control over the substantive requirements of the Federal Employers Liability Act, 45 U.S.C.A. §51 et seq., is in clear violation of the statute and the rights of the Appellant as guaranteed by the United States and Missouri Constitutions. The importance of this issue dictates that it be fully addressed by the Court at this time.

A.

M.A.I. 8.02, Instruction No. 11 in this case, is an incorrect statement of FELA damage law. Although the Court of Appeals summarily rejected Appellant's position, citing *Bair v. St. Louis-San Francisco Railway Co.,* 647 S.W.2d 507, 510-511 (Mo. banc), *cert. denied sub nom., Burlington Northern, Inc. v. Bair,* ____ U.S. ____, 104 S.Ct. 107 (1983). (Slip Opinion, p. 1), this Court in *Bair* did not address the merits of whether the instruction misstated the law, but merely stated that M.A.I. 8.02 was required by Supreme Court Rule to be given in FELA litigation. No court in Missouri has ever addressed the *substance* of this point. Instead, circular reasoning has been used to reject Appellant's position on the basis of cases which did not in fact consider, let alone decide, the question presented. The cases of *Fisher v. Burlington Northern, Inc.,* 640 S.W.2d 174 (Mo.App.

1982); *Marshell v. Burlington Northern, Inc.*, 637 S.W.2d 168 (Mo.App. 1982), *Dunn v. St. Louis-San Francisco Ry. Co., 621 S.W.2d 245 (Mo. banc 1981), cert. denied sub nom., Burlington Northern Railroad Co. v. Dunn,* 454 U.S. 1145, 102 S.Ct. 1007 (1982), although cited as controlling precedent, never examined the merits of the M.A.I. 8.02 issue.

M.A.I. 8.02 applies only to defendants in FELA cases. Originally the instruction authorized the jury to "...compensate plaintiff for any damages you believe he sustained as a direct result of the occurrence." In 1978, "direct" was omitted from the above language without any legal basis for the change.

The repeated approval by Missouri courts of the use of M.A.I. 8.02 constitutes a deprivation of Appellant's rights under the applicable federal law. Such deprivation has been accomplished without discussion of the substantive question and without examination of the merits of the important legal issue involved. Appellant respectfully submits that the validity of M.A.I. 8.02 as implemented by Supreme Court Rule 70.02(b) must be tested by Appellant's rights under the due process, equal protection, supremacy and commerce clauses of the United States Constitution. It is time that Missouri's highest Court considered the merits of Appellant's position. This Court alone has the power and ability to examine the matter fully and to terminate the discrimination currently practiced against FELA defendants in the State of Missouri and should order transfer in this case to accomplish that purpose.

APPENDIX I

INSTRUCTION NO. 11

If you find the issues in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future as a result of the occurrence of March 22, 1979. Any award you make is not subject to income tax. If you find plaintiff contributorily negligent as submitted in Instruction Number 8, then you must diminish the sum in proportion to the amount of the negligence attributable to plaintiff.

APPENDIX J

INSTRUCTION CONFERENCE

THE COURT: Let the record show that this instructional conference is being held in chambers and all references will be to N.A.I. Civil Instructions and, let the record further show, there has been discussion off the record relative to instructions and preliminary instruction conference held last night, is that correct, gentlemen?

MR. BUESCHER: That is correct, sir.

THE COURT: Is it also correct that counsel has submitted all the instructions they have or care to submit at this time?

MR. BUESCHER: Yes, sir.

MR. FRIEDMAN: Yes, sir.

THE COURT: Anything further on behalf of the Defendant?

MR. BUESCHER: No, sir.

THE COURT: Let the record further reflect, that there is one refute instruction offered by the Defendant that the Court has labeled A, and I've given each of you, gentlemen, a copy of that instruction that the Court has refused. Instruction Number 1 would be 2.01, given by the Court. Instruction Number 2 will be 2.03, given by the Court. Instruction Number 3 will be 3.01, given by the Court. Instruction Number 4 will be 2.02, submitted by Plaintiff and given by the Court. Instruction Number 5 is 2.04, submitted by the Plaintiff and given by the Court. Instruction Number 6 is 24.01, submitted by Plaintiff and given by the Court. Instruction Number 7 is 33.03. Let the record show that the Court has advised you, Mr. Buescher, has it not, that the Court does agree with your contention that the blanks referred to here should refer to the definition instruction. The Court is of the opinion that the clause as submitted refers to the verdict director in the blank and this instruction should so indicate that

you are conversing Plaintiff's verdict director and therefore, that in the second paragraph the correct blank in the Court's opinion should be Instruction Number 6 and again, in the blank in the third paragraph. However, you have indicated that you want the Court to give this instruction in the second paragraph and the third paragraph referring to other instructions which are definition instructions, is that correct?

MR. BUESCHER: That's correct; specifically 9 and 10. I requested the Court to make those references, respectively.

THE COURT: Very well. Instruction Number 8 is 32.07, 11.05, submitted by the Defendant and given by the Court. Instruction Number 9 is 11.02 submitted by Plaintiff and given by the Court. Instruction Number 10 is 11.05, submitted by Plaintiff and given by the Court. Instruction Number 11 is 8.02 and the last sentence with reference to the Defendant's affirmative defense is submitted instruction number blank, the blank will be filled in with the number 8, is that correct, Mr. Buescher?

MR. BUESCHER: The correct paragraph number is number 8. That's correct, Your Honor.

THE COURT: Gentlemen, have you examined the verdict form? Is the verdict form acceptable to the Plaintiff?

MR. FRIEDMAN: Yes, sir, Your Honor.

THE COURT: Verdict form acceptable to the Defendant?

MR. BUESCHER: Yes, Your Honor, it's in conformance of M.A.I., 36.01.

THE COURT: How much time are you asking for argument, gentlemen? Before we get to that, are there any further instructions to be offered at this time on behalf of either party?

MR. FRIEDMAN: No, sir.

MR. BUESCHER: No, sir.

THE COURT: Has the Court disposed of all instructions submitted to the Court by either party?

MR. BUESCHER: Yes.

MR. FRIEDMAN: Yes.

MR. BUESCHER: I might just for the record, that Missouri Law says I do not have to specifically object to those given by the Court and offered by Mr. Friedman, but I, of course, as he knows, you take the specific instructions in particular in 8.02, which in this case is Instruction Number 11 among others and the verdict director and, specifically, Number 11 as he knows, I believe that the word, "direct," should be in there as there is for other civil cases in the State of Missouri, and for that reason, feel that this F.E.L.A., Defendant, as well as others, is being unfairly discriminated against in the State of Missouri, by the use of M.A.I. and the directed use of M.A.I. by the Missouri Supreme Court.

THE COURT: You're not stating that there is a typographical error or admission in this instruction as opposed to the one in the M.A.I.?

MR. BUESCHER: I'm stating that the instruction was changed in 1978 to eliminate that word, and I feel that was an error to make that change.

THE COURT: Very well.

MR. FRIEDMAN: We have already been through the appeal on the Supreme Court. Marshall vs. Burlington Northern, and they upheld that instruction.

MR. BUESCHER: However, I would point out to the Court there has been no discussion as everyone knows of the actual issue involved in merely a reference to the fact that it's in M.A.I.

THE COURT: Very well, gentlemen. Anything further with respect to instructions?

MR. BUESCHER: No, Your Honor.

THE COURT: How much time are you asking for argument, Mr. Friedman?

MR. FRIEDMAN: Ninety minutes, Your Honor.

THE COURT: And how do you want your time decided?

MR. FRIEDMAN: Forty-five and forty-five.

THE COURT: Are you asking for a warning?

MR. FRIEDMAN: Five minutes, please.

THE COURT: Mr. Buescher, will five minutes warning suffice for you, sir?

MR. BUESCHER: Yes, sir, it will.

THE COURT: Anything further at this time?

MR. FRIEDMAN: No, sir.

MR. BUESCHER: No, sir.

(We are now in open court at 10:56 A.M. on the 3rd day of December, 1982.)

THE COURT: Ladies and Gentlemen of the Jury: The Court will now further instruct you as to the law.

APPENDIX K

SUPREME COURT REPORTER

Rule 70 as hereby amended shall read as follows:

RULE 70. INSTRUCTIONS

70.01APPROVAL OF INSTRUCTIONS—EFFECTIVE DATE—PUBLICATION PROCEDURE

Approval of instructions in civil actions will be made by order of this court. The caption of the approved instructions shall state the effective date. The Missouri Bar is directed to publish such approved instructions and notes on use or committee notes as this court authorizes, together with the date upon which the use thereof shall be required.

70.02INSTRUCTIONS TO JURIES

(a) WRITTEN INSTRUCTIONS—GIVING OR REFUSING. After a jury has been sworn to try a case but before opening statements the court must read to the jury Missouri Approved Instruction No. 2.01 which will be marked and given to the jury along with the other instructions at the close of the case but will not be reread by the court. Before the case is submitted the court shall call a conference of counsel to consider instructions. Any party may, before the case is submitted, request the court to instruct the jury in writing on the law applicable to the issues. The court may give instructions on its own motion. All instructions shall be submitted in writing and shall be given or refused by the court according to the law and the evidence in the case. All instructions shall be simple, brief, immaterial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts. All instructions shall be read by the court.

(b) MISSOURI APPROVED INSTRUCTIONS EXCLUDE OTHERS. Whenever Missouri Approved Instructions contains an instruction applicable in a particular case which the ap-

propriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other on the same subject.

(c) VIOLATIONS OF RULE—EFFECT. The giving of an instruction in violation of the provisions of this Rule shall constitute error, its prejudicial effect to be judicially determined. However, the use of an approved instruction or following notes on use before the effective date shall not be presumed to be error.

(d) MARKING—USE OF AND FILING. Each instruction shall be submitted with an original and one copy for the court and one copy for each party. Each copy shall indicate whether it was prepared at the court's direction or by which party it was tendered and shall contain a notation as follows:

> "MAI No. _____" or "MAI No. _____ modified" or "Not in MAI"

as the case may be. Original instructions which are refused shall be so marked by the court and filed with the clerk. Original instructions which are to be given shall be consecutively numbered and all shall be given as instructions of the court. Except where otherwise provided in Missouri Approved Instructions, they shall be given in such order as the court shall deem advisable. All instructions given shall be carried by the jury to their room and returned and filed at the conclusion of their deliberations. All instructions refused and all instructions given, including a record of who tendered them and the "MAI" notation, shall be kept as a part of the record in the case.

(e) GUIDE FOR THE FORM OF INSTRUCTIONS WHERE MAI NOT USED. Where an MAI must be modified to fairly submit the issues in a particular case, or where there is no applicable MAI so that an instruction not in MAI must be given, then such modifications or such instructions shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts.

(f) INSTRUCTION DIRECTING VERDICT—CONVERSE INSTRUCTION. Instructions may be given, authorizing a verdict for a defendant, upon finding the converse of any essential fact or element essential to a verdict for plaintiff. The request of a converse instruction shall not be deemed to waive any objection to the instruction conversed.

70.03 OBJECTIONS TO INSTRUCTIONS

Counsel need not object to any instructions to be given at the request of any other party or by the court on its own motion or to the refusal of any instructions requested by such party. Specific objections to instructions shall be required in motions for new trial unless made at trial. The making of objections during trial shall not preclude making additional objections to the same or other instructions in the motion for new trial. No general objection to instructions is required.

2. If is further ordered that this Order and Rule 70 be published in the April-May, 1977, issue of the Journal of The Missouri Bar.

3. It is further ordered that this Order and the foregoing Rule also be spread on the record of the Court en banc by attaching thereto a certified copy of the same.

Day-to-Day

ROBERT E. SEILER,
Chief Justice

Office - Supreme Court, U.S.
FILED
DEC 10 1984
ALEXANDER L. STEVAS.
CLERK

(2)

No. 84-598

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BURLINGTON NORTHERN RAILROAD COMPANY,
Successor in Interest by Merger to St. Louis-
San Francisco Railway Company,
Petitioner,

vs.

RAY FRAVEL,
Respondent.

On Petition for Writ of Certiorari To The
Missouri Court of Appeals, Eastern District

BRIEF FOR RESPONDENT IN OPPOSITION

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32-10

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to consider petitioner's contentions regarding plaintiff's argument when the decision in the State Courts below rests upon an independent and adequate state ground of decision, i.e., that such argument was a fair retort and response to defendant's own arguments and whether, in any event, plaintiff's argument may be disapproved when it merely addressed the issue of plaintiff's impaired future earning capacity in a manner entirely consistent with federal substantive law.

2. Whether this Court has jurisdiction to consider petitioner's contentions concerning the exhibition of plaintiff's injuries to the jury when petitioner's alleged federal claim was never presented to or decided by the state courts below and is, in fact, raised for the first time in this Court.

3. Whether the Missouri Approved (MAI) FELA damages instruction may be properly given when the same was designed for the express purpose of complying with the Federal Liability Employers' Act (FELA), which is an avowed departure from the common law.

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No. 84-598

IN THE

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OCTOBER TERM, 1984

BURLINGTON NORTHERN RAILROAD COMPANY,
Successor in Interest by Merger to St. Louis-
San Francisco Railway Company,
Petitioner,

vs.

RAY FRAVEL,
Respondent.

On Petition for Writ of Certiorari To The
Missouri Court of Appeals, Eastern District

OPINIONS BELOW

The opinion of the Missouri Court of Appeals, Eastern District, (App. A to the Petition) affirming the judgment for Respondent is reported as *Fravel v. Burlington Northern Railroad,* 671 S.W.2d 339 (Mo.App. 1984). The order of the Missouri Court of Appeals, Eastern District, denying Petitioner's Motion For Rehearing and/or Transfer of The Missouri Supreme Court (App. B to Petition) and the Order of the Missouri Supreme Court denying Petitioner's Application to Transfer to that Court (App. C to Petition) are not separately reported but are noted briefly with the opinion of the Missouri Court of Appeals. 671 S.W.2d at 339.

JURISDICTIONAL STATEMENT

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1257(3). Respondent specifically denies that jurisdiction of Question 1 of Petitioner's Questions Presented is conferred upon this Court under 28 U.S.C. §1257(3) for the reason, as will be more fully set forth below, that the judgment of the Missouri Court of Appeals, Eastern District, on this point rests upon an independent and adequate state ground. Respondent specifically denies that jurisdiction of Question 2 of Petitioner's Questions Presented is conferred upon this Court under §1257(3) because, as will be more fully set forth below, that Question was never raised, preserved or passed upon by the State courts below (and is, in fact, raised for the first time in this Court).

With respect to Petitioner's gratuitous remarks concerning its Motion for Stay filed in the state court, Respondent notes that Petitioner has not found itself required to file a Motion for Stay in this Court, nor will it be. Respondent affirmatively represents to this Court that no attempt has been made, or will be made, to execute upon the judgement in this case unless and until this Court has either denied certiorari or affirmed the judgment.

Respondent agrees that Petitioner timely filed its Petition in this Court within 90 days of the Missouri Supreme Court's July 17, 1984 denial of Petitioner's Application to Transfer this cause to that court.

STATEMENT OF THE CASE

Petitioner's statement of the case does not constitute a full and fair statement of the facts relevant to the issues herein. In order to avoid repetition additional relevant facts will be set forth under the appropriate point in the argument.

ARGUMENT

I.

The Writ Should Be Denied Because This Court Is Without Jurisdiction Of The Question Petitioner Seeks To Present Concerning Respondent's Argument To The Jury In That The State Courts Below Rejected Petitioner's Contentions On The Basis Of An Independent And Adequate State Ground. In Addition, Respondent's Argument To The Jury Was Entirely Consistent With, And In No Manner Violated, Federal Substantive Law Under The Federal Employer's Liability Act.

This Court is without jurisdiction of the question which Petitioner (sometimes hereinafter also "defendant") seeks to present for review regarding Respondent's (sometimes hereinafter "plaintiff") argument to the jury in this action. The opinion of the Missouri Court of Appeals, Eastern District, on this point clearly indicates that the rejection of Petitioner's claim was based upon an independent and adequate state ground of decision which bars review in this Court. *Murdock v. City of Memphis*, 20 Wall. (87 U.S.) 590, 22 L.Ed. 429 (1875); *Eustis v. Bolles*, 150 U.S. 361, 14 S.Ct. 131 (1893); *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 37 S.Ct. 318 (1917); *Fox Film Corp. v. Muller*, 296 U.S. 207, 56 S.Ct. 183 (1935); *Henry v. Mississippi*, 379 U.S. 443, 85 S.Ct. 564 (1965); *Michigan v. Tyler*, 436 U.S. 499, 512 n.7, 98 S.Ct. 1942, 1951 n.7 (1978). Further, the adequacy and independence of the state ground is clear from the face of the opinion of the Missouri Court of Appeals, Eastern District, and thus fully meets the test set forth in *Michigan v. Long*, ____ U.S. ____, 103 S.Ct. 3469 (1983).

In the instant case, the Missouri Court of Appeals, Eastern District, rejected defendant's complaints concerning plaintiff's argument on the ground that plaintiff's argument merely countered and was in retaliation to defendant's previous argument, which opened the door to the issue of plaintiff's employ-

ment future with defendant railroad by stating that plaintiff would be working for defendant railroad until retirement. The rules concerning "retaliatory" argument have been long established by Missouri law and have been consistently applied by the Missouri Courts in cases involving state substantive law, as well as in the instant case, which involves the FELA.

Doyle v. St. Louis San Francisco Railway Co., 571 S.W.2d 717 (Mo.App. 1978), cited by the Court of Appeals in the instant case, states the rule well. *Doyle* was a wrongful death action under state law arising out of an automobile/train collision at defendant railroad's crossing. On appeal, defendant railroad claimed, in part, that plaintiff's closing argument to the jury misstated the law, and that such required a new trial. In rejecting that claim, the court held:

> Railroad next urges us to reverse and remand because plaintiffs in argument on rebuttal misstated the law when they argued, "If the railroad track is of itself under all circumstances a warning of danger it wouldn't be necessary for this statute."
>
> [12-14] In determining whether the actions of the trial court with respect to argument of counsel were erroneous we consider oft repeated principles. The control of argument is with the discretion of the trial court and will be interfered with only in the event of abuse or discretion. *Naeger v. Naeger,* 339, S.W.2d 492, 497 (Mo.App. 1960). *A liberal latitude is indulged in argument of counsel especially in response to argument of opposing counsel. Contestible v. Brookshire,* 355 S.W.2d 36, 44 (Mo.1962). When considering argument of counsel on appeal we must attempt to place the challenged portion of the argument in the context of the entire argument and as the participants were seen and heard by the trial judge and we defer to his better opportunity to judge the effect which it might have upon the jury. *Schmid v. Langenberg,* 526 S.W.2d 940, 946 (Mo.App. 1975)

> *It has been said that it is within the province of the judge to determine how the jury might reasonably construe the language used, for language may reasonably convey more than one meaning. Naeger. The trial judge is in a position to discern the inferences conveyed by inflection and gesture.*
>
> 571 S.W.2d at 725, (emphasis supplied).

In *Lewis v. Bucyrus-Erie, Inc.*, 622 S.W.2d 920, 925-26 (Mo.banc 1981), an action based on a state strict liability products theory (and the second authority relied upon by the Court of Appeals in the instant case), the Court held:

> [6, 7] Plaintiffs next pose an array of challenges to comments of defense counsel during closing argument. In this connection several familiar principles bear iteration. The trial court is possessed of broad discretion in the area of closing arguments, not lightly to be disturbed on appeal. *Norfolk & Western Railway co. v. Greening,* 458 S.W.2d 268, 273 (Mo.1970); *S.G. Payne & Co. v. Nowak,* 465 S.W.2d 17, 20 (Mo.App. 1971); *Lineberry v. Robinett,* 446 S.W.2d 481, 486 (Mo.App.1969); *Arroyo v. Keller,* 433 S.W.2d 584, 588 (Mo.App.1968). Further, counsel is accorded wide latitude in arguing facts and drawing inferences from the evidence, id., *and the law indulges a liberal attitude toward argument, particularly where the comment complained of is fair retort or responds to prior argument of opposing counsel. Doyle v. St. Louis-San Francisco Ry. Co.,* 571 S.W.2d 717, 725 (Mo.App. 1978); *Lineberry v. Robinett, id.*
>
> (emphasis supplied)

In *Clark v. Mize,* 525 S.W.2d 635, 637 (Mo.App. 1975), the rule was stated as follows:

> That does not mean that one of the parties arguments will be considered in a vacuum and the other arguments ig-

> nored. To make such an application of Butcher would do away with the principle of fair retort. *When counsel has injected an issue in his part of the argument, he cannot then complain of the answering argument on that issue as raising or arguing improper issues.* (Citing cases)

(Emphasis supplied). See also, *Riley v. St. Louis Public Service Co.*, 245 S.W.2d 666, 673 (Mo.App. 1952); *Penberthy v. Penberthy,* 505 S.W.2d 122, 131 (Mo.App. 1973).

In applying these principles, a review of the opening portion of plaintiff's final argument will reveal a total absence of any comment whatsoever by plaintiff's counsel regarding plaintiff's employment status with the railroad. Nonetheless, in his argument to the jury defense counsel stated as follows:

> Now, after he came back has anyone on the railroad told him he couldn't do his job; that he was sloughing off, that he was lazy, goofing off? No, no. He's done his job. There is work for him, and heaven help us if the economy doesn't get any worse, there'll continue to be work for him. Because of his position, he has no—as you know from his evidence he has over thirty years of seniority from '53 to what will soon be '83. So he's getting on to thirty years of seniority. If anybody can hold a job and seniority in this day and time it will be a man of thirty years in seniority. As you know by the testimony of Mr. Prouty, all of those men with that same type of seniority you heard this morning have made about the same thing. So, *we can expect* that based on the actual experience, the facts not whims and fantasies, *the facts what's going to happen, you can predict from that that Mr. Fravel* just like he's done in two years past *will be working for the Burlington Northern, Frisco, in the Frisco yards in Springfield, Missouri, and that he'll be earning about what the other gentlemen in his craft with the same number of years' seniority are earning.* I think that's pretty obvious. He's done it these past years, he'll do it again. *Will he have any future lost earnings until*

the time of his retirement? Well, that depends on what evidence you believe. If you believe that in the future he's going to need another operation, he's going to lose whatever it takes to have that done in his knee and when he comes back to work. That operation is going to relieve his pain. So it will be better in that respect. It may or may not enable him to get around better and move that left leg. Then let's just assume it does. He'll be vack able to do his work more pain free than before, less the time that it took. Possible future lost wages in this credibility gap that we're talking about to you. Some, but not those hundreds of thousands of dollars. That is what I call a credibility gap. What is the evidence in this case about dollars and cents, Ladies and Gentlemen of the Jury? The only evidence—the only hard evidence is that that I presented to you and faced on Cross, Mr. Fravel said, oh, about thirty thousand dollars. What was the evidence? Well, the evidence was that in those months that we were talking about with Mr. Prouty during those periods of time the total gross, not net, but gross, would have been about the average of those three people; twenty six thousand four hundred dollars. That's the gross. You take the net, that is the take-home pay, the only thing that really counts off of that, and you're talking of some—based on Mr. Prouty's figures of less than twenty thousand dollars. So that's the only hard evidence that's in this case about damages, about past wage loss. Future wage loss, speculation, *but with a man with thirty years of seniority can hold a job—will hold a job and will be there working and earning until retirement.*

(T. 609-611) (emphasis supplied).

Defense counsel's argument, as set forth above, boils down to this: Because plaintiff has managed to work for the past two years, it follows inevitably, according to defense counsel, that plaintiff will be able to and will in fact be working for defendant

until retirement. In short, that the jury should make no award to plaintiff for the impairment of his capacity to work and earn or for future wage loss.

Defense counsel made this argument despite extensive evidence, admitted without objection, that plaintiff has suffered substantially diminished future earning capacity as a result of his injuries. The evidence showed that prior to being crushed by the steel car end, plaintiff was employed by defendant as a laborer, performing the strenuous physical job of dismantling rail cars. He returned to work after 20 months, and was first assigned to the same job he had before he was injured (T. 311). He could not do that job. He could not handle it (T. 311). He was in pain all of the time he was working (T. 311). He had to have the assistance of a ladder to even get in and out of the railroad cars (T. 311). He would have to place the ladder by the car, put his right foot up and drag the left one up behind (T. 311). His condition remained the same up to the present (T. 311-12). Plaintiff, at the time of trial, had been given a different assignment, involving sweeping and cleaning up, filling orders and grading rail (T. 312). He does not get along well on that job either (T. 312). Due to his injuries, he stumbles around. He can't step over things and is unable to bend his knee (T. 312). The situation is miserable (T. 312). Plaintiff described in detail the pain and limitation he endures 24 hours a day, every day (T. 312-16). Plaintiff has told his co-worker about the constant pain and has told him that he is not able to do the work he is doing now (T. 327). Plaintiff has also told his foreman, Mr. Thermon, that he is unable to do the work (T. 327). Mr. Thermon specifically told him that he is not doing the job he is supposed to be doing (T. 327). Sometimes it is so obvious that plaintiff cannot do the work that management must send another man out from the shop to do what plaintiff cannot (T. 328-29). Plaintiff went back to work with these problems because it was his only way of getting income (T. 316-17). However, his condition is getting worse (T. 316). Plaintiff testified, without objection, that he did not know how long the

railroad would keep him after the case was over and did not know how long he would be able to continue working (T. 382). Plaintiff did testify, however, again without objection, that he knows he can be removed from service if he is physically unable to do the job (T. 387).

Nevertheless, defense counsel argued, as set forth above, that the jury could "predict" and "expect" plaintiff to be employed by defendant railroad until retirement.

In response, plaintiff's counsel argued as follows:

> (by Mr. Friedman) He only has one opportunity. You have one opportunity to compensate him for all of the injuries and damages that he sustained to this point and that he'll sustain in the future, *and they say to you, he's got a job?* Have they given you any guarantees up here, any guarantees that Ray's going to be permitted to continue working when this case is over? Use your common sense. Use your common sense. Apart from what he knows his physical condition is going to be in the future.
>
> MR. BUESCHER: Your Honor, I'll object to that. The man's job and his entire position is to be controlled by the bargaining agreement. I resent—I greatly resent counsel's derogatory remarks on that issue.
>
> THE COURT: Objection is overruled.
>
> (by Mr. Friedman) What happens when this case is over. Use your—you know that's something that you take up to the jury room besides these written instructions that have been given to you by the Court. Your good common sense, your personal experience in thirty, forty, fifty years of life, and use it. What type of work is Ray going to be able to do. What type of job is he going to be able to hold. Who is going to hire him? How long is this railroad going to continue permitting him to work?

MR. BUESCHER: Your Honor—

THE COURT: Pardon me?

MR. BUESCHER: I again—I must reiterate to the Court, Your Honor, these kind of slurs are ridiculous. It is not supported by the evidence that's all.

THE COURT: Objection is overruled.
(T.634-635)(emphasis supplied).

Taken in context, it is abundantly clear that plaintiff's counsel in no manner suggested that defendant would fire or discharge plaintiff as soon as the case was over. Plaintiff's argument clearly pertained to the question of plaintiff's impaired earning capacity, as set forth above, and was based upon the above described evidence, which came in without objection, of plaintiff's difficulties in doing the job and the evidence of the future surgical procedures including a total hip replacement and a total knee joint replacement. Defendant's response to that evidence was to imply to the jury that plaintiff was virtually guaranteed a job until normal retirement, thereby attempting to minimize plaintiff's impairment of earning capacity. Plaintiff was justified in retaliating by asking whether defendant had guaranteed plaintiff continued employment—whether it could guarantee him such employment apart from what "he [defense counsel] knows his [plaintiff's] physical condition is going to be in the future." (T. 635) Obviously, a man, such as plaintiff, who is unable to fulfill all the duties of his job and requires assistance from other employees, and who has been advised by his foreman that he is not doing the work, is not guaranteed a job for life. Given plaintiff's severe physical disabilities at the time of the trial and the evidence that he faces future surgical procedures, including a total hip replacement and a total knee joint replacement, it is not unlikely that plaintiff will be unable to continue working or that the railroad may have to let him go for the perfectly legitimate reason that he cannot do his job. Such decisions are normally made by businesses and reference

to this fact in no manner creates passion or prejudice against the defendant. In the instant case it was merely responsive to defense counsel's argument that it could be "expected" or "predicted" that plaintiff would be able to continue working some additional 13 years until retirement. It is equally apparently that plaintiff would be extraordinarily unlikely to find other employment in light of the fact that his education is limited, he has always worked as a physical laborer, and no new employer would hire him as a laborer given his injuries, and his age.

The comments of plaintiff's counsel, in addition to being clearly supported by the evidence and pertinent to the issue of plaintiff's diminished earning capacity, were in direct response to and in retaliation to assurances offered to the jury by defense counsel that he could "predict" and "expect" that plaintiff will "hold a job and will be there working and earning until retirement," (T. 611).

An examination of the opinion of the Court of Appeals makes it clear that, based on the foregoing facts, the court rejected defendant's claims based on the state law rules pertaining to retaliatory argument. In so doing, the court relied solely on *Doyle, supra,* and *Lewis, supra,* both cases dealing exclusively with state law.

For the foregoing reasons, it is respectfully submitted that the judgment on this point below rests upon an independent and adequate state ground, barring review in this Court.

Even if it be assumed, *arguendo,* that this Court has jurisdiction of this matter, plaintiff's argument was entirely proper under existing federal substantive law under the FELA because it properly related to plaintiff's diminished capacity to work and earn money in the future as a result of his injuries, a proper item of damage under the FELA. In *Wiles v. New York, Chicago & St. Louis Railroad Co.*, 283 F.2d 328, 332 (3rd Cir.), *cert. den.* 364 U.S. 900, 81 S.Ct. 232 (1960), an action under the FELA,

plaintiff returned to his job after sustaining injuries but there was evidence that due to the same, he would not be employable as a new hire. In rejecting a defense contention that the jury improperly awarded damages for loss of future earning capacity, the Court held in part:

> The evidence that Wiles is employed by the Railroad at a larger salary than that which he was receiving when he was injured is a facet of the issue of damages which the jury was entitled to take into consideration as was the testimony that Wiles, with his present medical history, would have difficulty under the conditions of modern industry in obtaining gainful employment in heavy work except with his present employer. *Wiles is presently employed by the Railroad but this will not prevent him from being discharged or from being laid off. Because of his present employment Wiles has not yet suffered economic loss but if he cannot obtain gainful employment elsewhere he is chained to his present job in a kind of economic servitude.* We cannot think that it ws the intention of Congress in enacting the Federal Employers' Liability Act to effect such a result. Certainly, Wiles' economic horizons have been limited by his injury. See *Bochar v. J.B. Margin Motors, Inc.*, 1953, 374 Pa. 240, 94 A.2d 813. See also *Rice v. Philadelphia Transportation Company*, 1959, 394 Pa. 454, 147 A.2d 627; *Stark v. Lehigh Foundries, Inc.*, 1957, 388 Pa. 1, 130 A.2d 123. *The availability to Wiles of the labor market for heavy-duty workers was certainly a factor which the jury was entitled to take into consideration in fixing an amount for damages due to him for loss of future earning power.*
>
> (emphasis supplied)

This portion of the *Wiles* opinion was quite recently cited with approval by the Tenth Circuit in *Fulton v. St. Louis-San Francisco Railway Co.*, 675 F.2d 1130, 1134[9] (10th Cir. 1982).

Plaintiff's argument in the instant case did no more than point out the foregoing very proper considerations to the jury. In fact, in *Wiles*, plaintiff was not even experiencing difficulty in performing his job but there was evidence that he would not be accepted as a new employee elsewhere because of his history of injury. The foregoing statements concerning loss of future earning power have even more force when, as in the instant case, there is specific testimony and evidence that plaintiff is physically unable to perform his employment duties, must have the assistance of other workers and has been told he is not doing the job he is supposed to be doing (T. 312-316, 327-329). Plaintiff's evidence clearly was directed to plaintiff's physical disabilities resulting from his injuries and his consequent inability to properly perform on the job.

Plaintiff does not dispute defendant's claim that punitive damages may not be awarded in an FELA case nor does plaintiff dispute defendant's contention that damages may not be awarded in a FELA case for a discharge in retaliation for the filing of a FELA action. Plaintiff concurs in the view that a railway employee's claim of *wrongful discharge* (i.e., a discharge alleged to be without just cause and/or in violation of the terms of an applicable collective bargaining agreement) is normally within the primary and exclusive jurisdiction of the National Railroad Adjustment Board in the absence of proof that the employee's Union breached its duty of fair representation or some other factor which would undermine the integrity of the adjustment board process. However, the foregoing discussion of the argument at issue here makes it clear that those principles have no application to this case. Defendant concludes and assumes that the argument amounted to a contention that "the railroad would fire Respondent in retaliation for the exercise of his FELA rights as soon as the trial ended, and the jury should compensate Respondent and punish Petitioner for such action." Petition at 6. The foregoing discussion makes it clear that defendant's assumption in this regard is completely erroneous and totally unfounded. On the contrary, plaintiff's

counsel's argument was a proper comment on plaintiff's diminished earning capacity in light of his physical disability, and his future employability given his severe injuries and physical disability, was fully supported by the evidence, and was also a completely proper retaliatory response to defendant's argument that plaintiff, due to his seniority, was assured of continuous and virtually uninterrupted employment and income to retirement age.

The primary cases relied upon by defendant—*Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 92 S.Ct. 1562 (1972); *Landfried v. Terminal Railroad Association*, 721 F.2d 254 (8th Cir. 1983), *cert. den.* ____ U.S. ____, 104 S.Ct. 1712 (1984); and *Sharkey v. Penn Central Transportation Co.*, 493 F.2d 685 (2d Cir. 1974)—are all distinguishable from the instant case on this point. In each of the above cases, the plaintiffs sought damages for future lost wages which were attributable *solely* to an alleged wrongful discharge, not to permanent physical injury. In *Andrews*, plaintiff specifically averred that he had completely recovered from injuries sustained in an auto accident but that his carrier employer wrongfully refused to permit him to return to work, thereby in effect wrongfully discharging him. In *Landfried*, plaintiffs specifically based their claim for damages on an allegation of wrongful discharge. Their FELA claims were being litigated separately. In *Sharkey*, the only case of the three which was actually brought for personal injuries under the FELA, plaintiff's injuries were *not* permanent. Nevertheless, his counsel directly suggested to the jury that they should award $125,000.00 for future lost wages, emphasizing that the jury could thereby restore plaintiff's good name, besmirched by an alleged wrongful discharge. Since plaintiff's injuries were not permanent, future wage loss could be attributed only to the alleged wrongful discharge. Similarly, in *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), and *Beanland v. Chicago, R.I. & P.R.*, 480 F.2d 109 (8th Cir. 1973), (relied upon by defendant in the Courts below), damages were sought which would have flowed *solely* from an alleged wrongful discharge, and not

from any permanent physical injury suffered. In the instant case, plaintiff does not, and did not in argument, claim damages in this fashion. On the contrary, this case involves a plaintiff who has suffered severe and permanent injuries impairing his capacity to work and earn in the future. Plaintiff's argument merely responded to defendant's argument and sought to emphasize his legitimate damages due to his impairment of earning capacity flowing from his permanent and disabling physical injuries. *Wiles v. New York, Chicago & St. Louis Railroad Co.*, 283 F.2d 328, 332 (3d Cir.), *cert. den.*, 364 U.S. 900, 81 S.Ct. 232 (1960).

For the foregoing reasons, the writ should be denied as to Question 1.

II.

The Alleged Federal Question Contained In Question 2 Of Petitioner's Questions Presented, Dealing With The Exhibition Of Plaintiff's Injuries To The Jury, Was Never Presented To Or Passed On By, The State Courts Below, And Is Raised By Petitioner For The First Time In This Court. The Objections Made By Petitioner To The Exhibition In The Courts Below Were Based Solely Upon Questions Of State Law. Accordingly, This Court Is Without Jurisdiction Of Question 2.

The Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1257(3). On its face, §1257(3) requires that a federal right, such as that referred to in Petitioner's Question 2, be "specifically set up or claimed" in the state proceedings in order to confer jurisdiction upon this Court. This Court is without jurisdiction of an alleged federal question which has "never been raised, preserved or passed upon in the state courts below." *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1161, 1162 (1969).

Stated differently, to sustain this Court's jurisdiction under §1257(3), the question presented by the Petition for Writ of Certiorari must have been presented to the state courts in such a

way that it was necessarily passed on by the state appellate courts in affirming the judgment below. *Street v. New York*, 394 U.S. 576, 581-582, 89 S.Ct. 1354, 1360 (1969). *See also Bailey v. Anderson*, 326 U.S. 203, 66 S.Ct. 66 (1945) (same principle on direct appeal).

The prevailing test as to whether a federal question was sufficiently presented in the state courts to confer jurisdiction on this Court to review that question was stated by this Court in *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 49 S.Ct. 61 (1928). *Zimmerman* held a federal question must be raised "with fair precision and in due time" in the state courts in order to be reviewed in this Court.

In applying this test, two considerations should be kept in mind. First in order to present the federal question with "fair precision", the party presenting the question must at least make it clear that *federal*, rather than state law is being relied on. *See, e.g., Webb v. Webb*, 451 U.S. 493, 501, 101 S.Ct. 1889, 1894 (1981); *Bailey v. Anderson*, 326 U.S. 203, 206, 66 S.Ct. 66, 68 (1945); *New York Central & H.R.R. Co. v. New York*, 186 U.S. 269, 22 S.Ct. 916 (1902).

Secondly, whether the federal question was raised in "due time" is a question normally determined by state procedural rules. *See, e.g., Webb v. Webb*, 451 U.S. 493, 501, 101 S.Ct. 1889, 1894 (1981); *Beck v. Washington*, 369 U.S. 541, 549-554, 82 S.Ct. 955, 960-962 (1962).

The "federal" issue Petitioner seeks to present in Question 2 fails this test on both counts.

First, the record shows that Petitioner, at all times throughout the State court proceedings at all levels, stated its complaint concerning the exhibition solely in terms of state, not federal, law. This becomes apparent quite quickly if one examines the portions on the record referred to by Petitioner in its attempts to comply with Rule 21(h) of the Rules of this Court,

which generally requires that Petitioner specify that time and manner in which its alleged federal question was raised and preserved in the state court (Petition at 4-5). Significantly, Petitioner advises the Court of the timing of its objections, but fails to specify the substantive basis of the claims it presented in state court.

Recourse to the record shows that the only ground for the objection which Petitioner interposed immediately prior to the exhibition of Plaintiff's injuries to the jury was as follows:

> "MR. BUESCHER: I would object to any demonstrations of the patient as being intended to inflame the jury, Your Honor. It will prove nothing for the benefit of the jury. Everything that he would show has already been demonstrated—testified to. The only purpose of any viewing of the injury of this man would be, sir, only to inflame them. It would be so highly prejudicial as to in this case, and as to the harm of this trial and I would object to it, Your Honor."

(T. 460; App. D to Petition, p. A-11). This objection clearly relies solely on Missouri state law, and contains no hint that it pertains to, or relies upon, any federal claims. Similarly, when Petitioner moved for a mistrial following the completion of the testimony of plaintiff's medical expert, the sole basis of Petitioner's claim was that the now-completed demonstration was alleged to have been merely repetitive and therefore served no purpose other than to inflame the jury and arouse passion and prejudice (T. 508; App. D to Petition, at A-12). Similarly, petitioner's motion for new trial alleged no more than that the demonstration was improper because it allegedly inflamed the passion and prejudice of the jury (Motion for New Trial, paragraph 24, 25; App. E to Petition at A-15). Similarly, the basis of Petitioner's claims on appeal before the Missouri Court of Appeals, Eastern District (Petitioner's Brief in the Court of Appeals, Point I, App. F to Petition at A-16-17), in its Motion for Rehearing, paragraph 2 (App. G to Petition at

A-23), and in its Application for Transfer to the Missouri Supreme Court, Point II (App. H to Petition at A-25-26) continued to be the *state law* claim of improper appeal to the passion and prejudice of the jury. At no time in the various proceedings in the Missouri state courts did Petitioner ever claim (as it does for the first time in this Court, see Petition at 12) that permitting the exhibition of plaintiff's injuries to the jury somehow violated the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. Even in its Application to Transfer to the Missouri Supreme Court, filed after the opinion of the Missouri Court of Appeals at issue herein was entered, Petitioner claimed only that the Court of Appeals' rejection of Petitioner's contentions concerning the exhibition was "contrary to the existing Missouri decisional law." (Application to Transfer, Point II; App. H to Petition at A-25). The Application made no mention whatsoever of federal law on this point.

Thus, Petitioner did not even seek to present its alleged federal issue in its Motion for Rehearing or its Application for Transfer [compare *Eddings v. Oklahoma*, 455 U.S. 104, 113 n. 9, 102 S.Ct. 869, 876 n. 9 (1982)]. The federal claim is raised for the first time in this Court.

Petitioner utterly failed to present a federal question with fair precision, in due time and in accordance with Missouri procedure in the state courts. The question presented by Petitioner in this Court was not passed on by the state courts. No federal claim was specially set up or claimed by Petitioner. Consequently, this Court has no jurisdiction of Question Presented 2 under 28 U.S.C. §1257(3). *Tacon v. Arizona*, 410 U.S. 351, 93 S.Ct. 998 (1973); *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354 (1962); *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161 (1969); *Beck v. Washington*, 369 U.S. 541, 549-554, 82 S.Ct. 955, 960-962 (1962); *Ellis v. Dixon*, 349 U.S. 458, 75 S.Ct. 850 (1955); *Edelman v. People of California*, 344 U.S. 357, 73 S.Ct. 293 (1953); *Bailey v. Anderson*, 326 U.S. 203, 66 S.Ct. 66

(1945); *State Farm Mutual Ins. Co. v. Duel*, 324 U.S. 154, 65 S.Ct. 573 (1945); *Herndon v. Georgia*, 295 U.S. 441, 55 S.Ct. 794 (1935); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 23 S.Ct. 375 (1903).

For jurisdictional purposes, this case is controlled by *Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889 (1981). In *Webb*, a child custody matter, petitioner (the mother) claimed in the Georgia state courts that they were required to give "full faith and credit" to a Florida judgment awarding her custody. The mother did not mention the federal constitution in making this claim nor did she specifically refer to Article IV, §1 of the United States Constitution. The Georgia courts awarded the father custody. On petition for writ of certiorari, this Court held that petitioner's references to "full faith and credit" in the Georgia courts referred to state law issues under Georgia's Uniform Child Custody Act, a statutory full faith and credit requirement. Since petitioner did not set forth in the state courts that her "full faith and credit" claim was based on federal law, the writ was dismissed for lack of jurisdiction, and this Court held:

> "At the minimum, however, there should be no doubt from the record that a claim under a federal statute or the federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure, when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court.
>
> Because petitioner failed to raise her federal claim in the state proceedings and the Georgia Supreme Court failed to rule on a federal issue, we conclude that we are without

jurisdiction in this case. Accordingly, the writ is dismissed for want of jurisdiction."

451 U.S. at 501-502, 101 S.Ct. at 1894.

So it is here.

Further, Petitioner's claim in this Court that the alleged error of state law by the Missouri Courts in "this FELA case" infringes upon Petitioner's rights under the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution does not constitute a federal question of substance, reviewable in this Court. If such were the case, any litigant who could similarly claim identification with a particular class of litigants could claim a right in this Court to seek review of *any* state issue decided adversely to such litigant. As stated by this Court in *Enterprise Irrigation District v. Farmers Mutual Canal Company,* 243 U.S. 157, 165-166, 37 S.Ct. 318, 321-322 (1917):

> "The claim that the court, in disposing of some of the questions, including that of the estoppel, misconceived or misapplied the statutory and common law of the state, and thereby infringed the due process and equal protection clauses of the 14th Amendment, requires but brief notice. The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law. *Sayward v. Denny,* 158 U.S. 180, 186, 39 L. ed. 941, 943, 15 Sup. Ct. Rep. 777; *Central Land Co. v. Laidley,* 159 U. S. 103, 112, 40 L. ed. 91, 94, 16 Sup. Ct. Rep. 80; *Castillo v. McConnico,* 168 U.S. 674, 683, 684, 42 L. ed. 622, 625, 626, 18 Sup. Ct. Rep. 229. The questions presented, other than those relating to the validity of the state board's adjudication, all turned exclusively upon the law of the state, and the state court's decision of them is controlling. *Preston v. Chicago,* 226 U. S. 447, 57 L. ed.

293, 33 Sup. Ct. Rep. 177; *St. Louis & K.C. Land Co. v. Kansas City*, 241 U. S. 419, 427, 60 L. ed. 1072, 1077, 36 Sup. Ct. Rep. 647; *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 116, 57 L. ed. 1410, 1416, 33 Sup. Ct. Rep. 967. The reference to the equal protection clause evidently is inadvertent, for there is no claim of unwarranted or arbitrary discrimination.

It results from what has been said that the judgment is one which is not open to review by this court.

Writ of error dismissed."

Similarly, in the instant case there is no claim of unwarranted or arbitrary discrimination on this point—only a claim of misapplication of Missouri law. Nor could this Petitioner sensibly make a claim of such discrimination given the fact that this same Missouri Court of Appeals, Eastern District, reversed a very substantial FELA judgment against this very same Burlington Northern Railroad (and in favor of a plaintiff represented by plaintiff's counsel in this case), relying in part on the same state law ground at issue here: appeal to the passion and prejudice of the jury by misuse of demonstrative evidence. *Anderson v. Burlington Northern Railroad Co.*, 651 S.W.2d 176, 182-183 [6] (Mo.App. 1983). It is noteworthy that Judge Simon, of the Missouri Court of Appeals, sat on the panel which reversed in *Anderson* and on the panel which affirmed in the instant case.

For all the foregoing reasons, Respondent respectfully suggests that this Court lacks jurisdiction of Petitioner's Question Presented No. 2.

III.

Defendant's Contentions Regarding The Omission Of The Word "Direct" From MAI No. 8.02 Are Likewise Entirely Without Merit.

Defendant's contentions concerning the absence of the word "direct" from MAI No. 8.02. are without merit. It is a full and complete answer to defendant's constitutional contentions that the absence of the word direct from MAI 8.02 is for the purpose of making that instruction comply with the substantive law. Since the instruction is in this form for the purpose of complying with the substantive federal law, there can be no violation of equal protection, due process or the Supremacy clause, as this would clearly constitute a reasonable basis for the differences between MAI No. 8.02 and MAI No. 4.01. This matter was carefully considered by the Missouri Supreme Court Committee on Instruction and this change was only recently made in the 1978 revisions. The Committee explains this change as follows:

> This instruction is used only in an F.E.L.A. case wherein the employee sustained injury. It is a duplicate of MAI 4.01 with the exception that the word "direct" is deleted from the fifth line of MAI 4.01. This is done in an F.E.L.A. case so that the instruction complies with the correct substantive law, *Wilmoth v. Rock Island Railroad,* 486 S.W.2d 631 (Mo. 1973); *Crane v. Cedar Rapids and Iowa City Ry.,* 352 U.S. 500 (1957)." (MAI No. 8.02, Committee's Comment.)

The reasoning underlying the omission of the word direct from this damages instruction is further amplified in the committee's comment to the revision to MAI No. 24.01, which states as follows (MAI No. 24.01, Committee's Comment):

> In an F.E.L.A. case, common law negligence rules are controlling except that these rules have been abrogated by F.E.L.A. Because of the "in whole or in part" language

of the statute (Title 45, U.S.C.A., Section 51), the traditional doctrine of proximate (direct) cause is not applicable. A railroad is liable if its negligence is only the slightest cause of the employee's injury. *Rogers v. Mo. Pac. Ry.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).

In the traditional negligence case, it is mandatory for the plaintiff to include the word 'direct' or 'directly' in his instruction because of the proximate (direct) cause requirements.

This prevents the jury from awarding damages or finding for plaintiff because of some indirect or contributing causative factors. This is not so with F.E.L.A. The F.E.L.A. 'was enacted because the Congress was dissatisfied with the common law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence.' *Rogers v. Mo. Pac. Ry., supra,* 352 U.S. 500, 507. The test of a jury case under F.E.L.A. is simply 'whether the proofs justify within reason the conclusion that employer's negligence played any part, even the slightest, in producing injury or death for which damages are sought.' (emphasis added). *Rogers v. Mo. Pac. Ry., supra,* 352 U.S. 500, 506. The fact that there may have been a number of causes of the injury is, therefore, irrelevant as long as one cause may be attributable to the railroad's negligence. *Heater v. C & O Ry. Co.*, 497 F.2d 1243, 1246.

As the United States Supreme Court has stated in *Rogers v. Mo. Pac. Ry., supra,* in an F.E.L.A. case, the employer railroad is stripped of its common law defenses. The statute is an avowed departure from the rules of common law. Our state Supreme Court has consistently held that the federal interpretation of F.E.L.A. is binding on the

Missouri state courts. *Headrick v. Kansas City Southern Ry.*, 305 S.W.2d 478 (Mo. 1957); *Adams v. Atchison, T. & S.F. Ry.*, 280 S.W.2d 84 (Mo. 1955).

It is obvious from the foregoing that the Missouri Courts recognize that federal law is controlling as to substantive aspects of the F.E.L.A. in cases tried in state court. The present form of MAI 8.02 is nothing more or less than action designed to conform MAI instruction to federal substantive law.

Additionally, this same railroad petitioner has previously raised precisely this same issue concerning the validity of MAI 8.02 and the absence of the word "direct" from that instruction. Petitioner's identical contentions were rejected by the Missouri Supreme Court, en banc, and Petitioner's petition for a writ of certiorari raising the same contentions was denied by this Court. *Bair v. St. Louis-San Francisco Railway Co.*, 647 S.W.2d 507 (Mo.banc), cert. denied sub. nom. Burlington Northern, Inc. v. Bair, ____ U.S. ____, 104 S.Ct. 107 (1983). The *Bair* opinion was authored by Judge Blackmar, an acknowledged authority on federal jury practice and co-author of *Devitt & Blackmar, Federal Jury Practice and Instructions*, and the *Bair* opinion clearly discloses no concern that MAI 8.02 deprives railroad defendants of any substantive federal rights under the FELA. In this regard, a review of the damage instructions contained in *Devitt & Blackmar,* a standard and established source for pattern federal instructions, shows that they do not uniformly require inclusion of the word "direct."

In short, Petitioner has wholly failed to make any showing whatsoever that MAI 8.02 does not accurately reflect the federal substantive law under the FELA or that its use violates any of Petitioner's constitutional rights. Accordingly, its contentions should be rejected in their entirety.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that no aspect of the judgment below warrants review by this Court, and that the Petition for Writ of Certiorari should accordingly be denied.

Respectfully submitted,

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